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Issue Date: 03 November 2003

CASE NO.: 2003 STA 36

In the Matter of

ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH
Prosecuting Party

and

DOMICO ROMERIO BRYANT
Complainant

v.

MENDENHALL ACQUISITION CORP.
d/b/a BEARDEN TRUCKING
Respondent

Appearances: Mr. Dan Steffenson, Attorney
For the Prosecuting Party

Mr. James T. Calmes, III, Attorney
For the Respondent

Before: Richard T. Stansell-Gamm
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This action arises under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act ("STAA" or "Act") of 1982, as amended and re-codified, Title 49 United States Code, Section 31105, and the corresponding agency regulations, Title 29, Code of Federal Regulations ("C.F.R."), Part 1978. Section 405 of the STAA provides for employee protection from employer discrimination because the employee has engaged in a protected activity, consisting of either reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle when the operation would violate these rules.

On December 16, 2002, Mr. Bryant filed a discrimination complaint under the Act, alleging the Respondent, Mendenhall Acquisition Corp., d/b/a Bearden Trucking ("Bearden Trucking"), terminated his employment in retaliation for his compliance with the federal hours of service regulation. Following an investigation, on May 9, 2003, the Regional Administrator, Occupational Safety and Health Administration ("OSHA"), United States Department of Labor ("DOL"), informed Bearden Trucking that he had a reasonable belief that Bearden Trucking had violated the Act. Specifically, Bearden Trucking terminated Mr. Bryant on November 27, 2002 because he refused a dispatch on the basis that he needed a federally mandated eight hour rest break. In light of the discrimination violation, the Regional Administrator directed Bearden Trucking to pay Mr. Bryant $18,582.05 as compensation for lost wages between his termination date and an April 4, 2003 declination of an offer to return to work as a driver with Bearden Trucking.

On May 27, 2003, Bearden Trucking objected to the Regional Administrator's findings and requested a hearing. Pursuant to 29 C.F.R. § 1978.107, since Bearden Trucking objected to the finding of discrimination, the Assistant Secretary, DOL, became the prosecuting party. Pursuant to a Notice of Hearing, dated June 5, 2003 (ALJ I),[1] I conducted a hearing in Greenville, South Carolina on July 14, 2003. Mr. Bryant, Mr. Steffenson, Mr. Mendenhall, and Mr. Calmes were present at the hearing. My recommended decision and order in this case is based on the testimony presented at the hearing and the documents admitted into evidence (PX 1 to PX 9 and RX 1 to RX 6).

ISSUE

Whether the Respondent, Mendenhall Acquisition Corp., d/b/a Bearden Trucking, violated the employee protection provisions of the Act by terminating the employment contract of the Complainant, Mr. Domico Bryant.

Parties' Positions

Prosecuting Party[2]

On November 26, 2002, at 10:30 p.m., while under contract with the Respondent, Bearden Trucking, as an owner-operator, Mr. Bryant had completed approximately eleven hours of duty and driving when he received a request from the Respondent to take another load. The load required Mr. Bryant to leave about six hours later at 4:30 a.m on November 27, 2002. Because that departure would violate the DOT (U.S. Department of Transportation) hours of service regulations, Mr. Bryant refused to take the load. On November 27, 2002, Bearden Trucking terminated his contract.

Mr. Bryant has established all three elements of a *prima facie* case of retaliatory discrimination. First, Mr. Bryant's refusal to drive a load in the early morning of November 27, 2002

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[1]The following notations appear in this decision to identify evidence: PX - prosecuting party exhibit; RX - respondent exhibit; ALJ - administrative law judge exhibit; and, TR - transcript.

[2]Opening statement (TR, pages 6 and 7) and closing brief, dated October 3, 2003.

due to his hours of service limitation was a protected activity. Mr. Mendenhall's admission that Mr. Bryant's refusal to drive was the "straw" that prompted his termination decision establishes the second requisite causation element. Third, Mr. Mendenhall's termination of Mr. Bryant's contract was an adverse action.

Mr. Mendenhall's purported other motives for his termination decision fail to insulate him from liability for the adverse action. According to Mr. Mendenhall, he planned to terminate his business relationship with Mr. Bryant because he was not as productive as other drivers, refused to drive on Sundays, and had proven to be unreliable. These stated motives are inconsistent with other facts in the record. Notably, Mr. Bryant never received any complaints about his availability or reliability. In fact, on occasions, Mr. Bryant put in more hours than other drivers. His unavailability in November for two weeks was caused by legitimate family and health emergencies. Additionally, Mr. Bryant's refusal to drive on Sunday was consistent with the acknowledged agreement between Mr. Bryant and Mr. Mendenhall that he would not be required to work on Sunday.

Even if the stated motives were legitimate, they do not alter the outcome of the discrimination analysis because Mr. Mendenhall has indicated that the November 26, 2002 refusal to drive was the event that caused him to terminate Mr. Bryant when he did. In other words, even in the presence of other motives, the principle event that caused Mr. Bryant's termination was his refusal to take the November 27, 2002 trip to Georgia.

Due to the contract termination based on retaliatory discrimination, Mr. Bryant eventually lost his truck and ability to drive as an owner-operator. Mr. Bryant attempted to mitigate his damages but he eventually had to take lower paying work as a local driver. As result, Mr. Bryant seeks back and differential pay of $14,533.24, plus interest. He also requests continuing weekly payments of $226.54 as front pay for "a reasonable period of time" based on his reduced earning capacity. Although the Respondent has offered him another position, that wage is lower than the amount he presently earns and the amount he earned as an owner-operator working for Bearden Trucking. Mr. Bryant is not interested in reinstatement.

<u>Respondent</u>[3]

The Respondent did not terminate Mr. Bryant's contract because he raised a safety concern. Bearden Trucking terminated Mr. Bryant's contract for failure to perform his duties. Mr. Bryant's reliance on one sentence in Mr. Mendenhall's six page written statement to Mr. Boyd falls well below the requisite standard to impose liability on Bearden Trucking.

The evidence in the record fails to corroborate or substantiate Mr. Bryant's testimony that Mr. Mendenhall told him that he was terminated due to his refusal to take a load. Instead, since his first written response to the complaint, Mr. Mendenhall has been consistent in his stated reasons for terminating the contract with Mr. Bryant. Mr. Bryant had become an undependable driver who declined to work on the weekends. As a result, he was no longer a productive driver for Bearden

[3]Opening and closing statements (TR, pages 8 and 242 to 248).

Trucking.

Even if liability is imposed on Bearden Trucking, Mr. Bryant failed to fully mitigate his damages. Mr. Bryant is a qualified and experienced driver. Considering the high demand for drivers, he should have had no problem finding a new driving position with comparable pay. Instead of fully attempting to obtain re-employment, Mr. Bryant imposed numerous work conditions, such as no Sunday driving, which eliminated many job opportunities.

SUMMARY OF EVIDENCE

For the Prosecuting Party

Sworn Testimony of Mr. Domico Romerio Bryant
(TR, pages 19 to 89)

[Direct examination and ALJ examination] After high school, Mr. Bryant spent five to six years gaining experience driving trucks. During that period, he drove a school bus, flatbed truck, over-the-road truck, and a cement mixer. In May 2001, he started working for Bearden Trucking as a local tractor-trailer driver. At that time, he was paid an hourly wage of $11 and earned between $750 and $1,100 a week. Later, the company changed the compensation plan to a flat rate per stop. Under this system, he received about $450 to $650 a week. During this period of employment, Mr. Bryant had an agreement with Mr. Mendenhall that he would not work on Sundays in order that he might attend church. On occasions, he would accept a driving assignment that began late Sunday afternoon or early evening.

In February 2002, Mr Bryant purchased his own truck. After receiving his licenses, in March 2002, Mr. Bryant began working for Bearden Trucking as an owner-operator. In June 2002, Mr. Bryant went to work for another trucking company, Palmetto State Transportation. Mr. Bryant still didn't work Sundays. In early August 2002, Mr. Bryant returned to Bearden Trucking because he was losing money with the other company. Mr. Mendenhall agreed he could return.

Bearden Trucking runs a seven day a week operation which means Mr. Bryant's on-duty limit was 70 hours in eight days. Mr. Bryant recorded his hours in a log book and provided a copy of the entries to Bearden Trucking. He never received any feedback about his time logs.

During his last months with Bearden Trucking, in October and November 2002, Mr. Bryant refused loads ona few occasions due to DOT hours of service limitations. On one occasion, Mr. Craig Salvo asked him to take a load. When Mr. Bryant refused because he was out of DOT driving hours, he called Mr. Mendenhall. Mr. Mendenhall told Mr. Bryant that if he was out of hours, Mr. Mendenhall would find another driver.

Mr. Bryant received no verbal or written warnings from Bearden Trucking about poor performance. He was never informed that his performance was being reviewed. Since his return to

Bearden Trucking in August 2002, Mr. Bryant had been asked to drive over his hours limitation more than ten times.

In the early morning of November 26, 2002, in Lebanon, Indiana, while Mr. Bryant was sleeping in the truck cab, he was awoken at 3:00 a.m. due to a loading problem. At 4:30 a.m., as he departed, Mr. Bryant called Mr. Mendenhall and informed him about the departure delay due to the need to reload the truck. Mr. Bryant then drove 30 minutes and stopped in Blacklands, Indiana to sleep. When woke up at 10:30 a.m. he called Mr. Salvo and told him that he would call later in the day upon his arrival in Greenville, South Carolina. In Corbin, Kentucky, Mr. Bryant experienced a traffic delay, stopped for fuel and took a one hour break. At that location, around 4:00 p.m., he called Mr. Mendenhall to tell him his anticipated arrival time was 10:30 p.m. Mr. Mendenhall replied that he had better hurry up and sleep because he was being dispatched at 3:00 a.m. for a 6:00 a.m. delivery in Smyrna, Georgia. Mr. Bryant told Mr. Mendenhall that for safety reasons he would not be able to take that load because it would put him over his hours of service. Mr. Mendenhall eventually said okay. Mr. Bryant arrived in Greenville, South Carolina at 10:30 p.m.

The next morning, the Wednesday before Thanksgiving, Mr. Bryant called Mr. Mendenhall to determine whether a settlement check could be picked up that day or on Friday. At that time, Mr. Mendenhall told Mr. Bryant that his contract was terminated. When Mr. Bryant asked why, Mr. Mendenhall replied that it was because he refused the load. Mr. Bryant specifically asked Mr. Mendenhall whether he was terminating the contract because he refused a load that would put him over his hours. Mr. Mendenhall said yes.

That same day, after picking up his wife, Mr. Bryant went to Mr. Mendenhall's office. Mr. Mendenhall repeated that the contract was terminated because Mr. Bryant had refused to take the load to Atlanta. A few days later, Mr. Bryant returned to the office about a settlement check. Mr. Mendenhall told him that under the contract Bearden Trucking had 15 days to settle and could hold the last settlement check up to 90 days. Mr. Bryant received a settlement payment two weeks later and did not receive the last settlement check until January 2003.

The next week, Mr. Bryant started looking for work and found another job mid-December 2002 with Thomas Enterprises as an owner-operator. Rather than the 89 cents[4] a mile he had received from Bearden Trucking, Mr. Bryant earned 80 percent of the gross for each load. He covered all expenses (PX 6 is his handwritten expense summary). Eventually, Mr. Bryant spent a lot of his time running empty and was unable to cover his expenses, including the truck payments. So, by the end of January 2003, he was looking for other work as an owner-operator.

At the end of February 2003, Mr. Bryant was no longer able to continue as an owner-operator with Thomas Enterprises. His truck tags expired then and Mr. Bryant was unable to pay the $1,000 annual renewal fee. As a result, he returned the truck to the dealer and focused on obtaining a local

[4]During another portion of his testimony, Mr. Bryant indicated he received 82 cents a mile (TR, pages 77 and 78). His settlement statements with Bearden Trucking reflect a rate of 82 cents a mile (PX 7 and PX 8).

driver job. Although Mr. Bryant had been an over-the-road driver with Bearden Trucking, he did not look for that type of work because most companies require a driver to be away from home 10 to 14 days straight. He reviewed the classified ads, made seven to eight contacts a week, filled out applications, and received a few job offers, including one position at $12 an hour. The terms of the various offers, such as time away from home, the requirement for truck, or the lack of benefits made them unacceptable. Finally, on April 2, 2003, Mr. Bryant started driving for Hardaway Concrete for $12 an hour plus benefits.

Bearden Trucking did offer to reinstate him as a company driver since he didn't have a truck. However, the pay was less than he had received as an owner-operator. The offer was also less than the amount he was presently earning at Hardaway Concrete. When Mr. Bryant worked for Bearden Trucking as an owner-operator he did not receive employee benefits such as vacation pay, holiday pay and insurance.

If Bearden Trucking had not terminated his contract, Mr. Bryant would have been able to make his truck payments and would still have the truck. When he purchased the truck, Mr. Bryant was able to qualify for a first time buyer's program. He would no longer qualify for that program now. Mr. Bryant's truck, a 1998 Freightliner Century-Flex, was in "sound" condition. Mr. Bryant purchased a two year warranty agreement with the truck. Because the finance company repossessed the truck in February 2003, Mr. Bryant believes his credit report has been adversely affected and that he would have to pay a higher interest rate, which he could not afford, to purchase another truck. Consequently, although he could probably purchase another truck, that action would not be "economically sound."

From August 2002, Mr. Bryant worked with Bearden Trucking based on a contract, marked "PX 3," which represents the entire agreement between Mr. Bryant and Bearden Trucking. He was not an employee of Bearden Trucking. Instead, he was "a contractor." Under the contract, Mr. Mendenhall would obtain loads, such as frozen foods or baled cotton, from various customers that needed to be transported and Mr. Bryant would then drive his tractor truck to haul the loaded trailer, many times across state lines. The written agreement, PX 3, does not indicate Mr. Bryant will have Sundays off. His understanding about Sunday work was based on a verbal agreement with Mr . Mendenhall.

[Cross examination] His monthly payment for the truck was about $1,800. Sometime between August and November 2002, he told Ms. Cox, the Bearden Trucking office manager, that he was late with his monthly payments. That is, he paid them each month but not on the due date. Mr. Bryant did not tell her that he was behind (hadn't paid for a month) in the payments.

In reviewing RX 1, Mr. Bryant agrees he never worked more than 59 hours in any one settlement week with Bearden Trucking. It also reflects that he didn't work the first week of November and worked only ten and a quarter hours in the third week of November. The record also shows that, at times, he worked less than other drivers. Mr. Mendenhall did not tell him that he was not working enough hours and hampering business.

When Mr. Bryant quit his first job after leaving Bearden Trucking, his truck payments were current "to an extent."

When applying for other driver positions, Mr. Bryant asked the prospective employer not to contact Bearden Trucking. He believed Mr. Mendenhall might hamper his ability to get a job.

RX 3 (also PX 1) is the termination letter. It does not list his refusal to drive as a basis for the termination. When Mr. Bryant went to Mr. Mendenhall's office to discuss the termination, Ms. Cox was present, sitting at a desk about 25 feet from Mr. Mendenhall and Mr. Bryant. The conversation was loud enough for her to hear it, but she walked out of the room. Mr. Salvo was not there.

After Mr. Bryant saw Mr. Mendenhall the second time about his settlement check, he received a "no trespassing" order. Mr. Bryant did not physically threaten Mr. Mendenhall.

Mr. Bryant called Mr. Mendenhall a second time from Kentucky as part of his evening status call at 4:00 p.m. Prior to that call, he did not know he was going to be assigned the Smyrna, Georgia trip. When he called at 4:00 p.m., he first spoke with Mr. Salvo who told him about the Georgia dispatch. When Mr. Bryant stated he couldn't take it, Mr. Salvo told him to speak with Mr. Mendenhall. Mr. Mendenhall then called Mr. Bryant. He wanted Mr. Bryant to hurry up and sleep because he had a 3:00 a.m. dispatch. Mr. Bryant told him for safety reasons he could not take the dispatch.

Mr. Bryant has been in the trucking business a number of years and knows the importance of timely deliveries to customers.

Mr. Bryant did not work the first week in November because his wife needed him at home. He didn't work much the third week because of numbness in his arm. He went to the emergency room twice that week for high blood pressure. Mr. Bryant did not believe the holiday season was a busy time of the year for the trucking company.

Under his contract, Mr. Bryant was paid 82 cents a mile, whether running loaded or unloaded. He was required to cover all his expenses, including truck payments and maintenance from those proceeds. On average, after expenses, he netted about $1,080 a week. When he left Bearden Trucking the first time and started driving for Palmetto State Transportation, he received a higher mileage rate. When there wasn't enough work at that company, he returned to Bearden Trucking. Mr. Mendenhall had as much work as Mr. Bryant wanted.

On two occasions, Mr. Mendenhall had asked Mr. Bryant to drive Sunday morning and he had refused. Mr. Mendenhall said okay both times and did not terminate his contract.

Without referencing his driver's log book, Mr. Bryant does not recall the specifics about the other incident when he was asked to drive beyond his hours of service limits.

Mr. Boyd took his statement in a motel room. He took his wife's statement at their home. Mr. Bryant believes Mr. Rick Beaver is a semi-business partner with Mr. Mendenhall.

[Re-direct examination] To Mr. Bryant's knowledge, his inability to work Sunday mornings was not a problem for Bearden Trucking. He accepted loads that left later in the day on Sunday.

[Re-cross examination] Mr. Bryant left Thomas Enterprises because he no longer had the money to continue operating his truck. He was not able to make all the runs the company had because he was not authorized to operate in New York. Although he had a weekly income of up to $1,400, that sum did not have all the expenses taken out.

<u>Sworn Testimony of Mr. Allen D. Boyd</u>
(TR, pages 90 to 124)

[Direct examination] Since 1994, Mr. Boyd has worked as a regional investigator for the Occupational Safety and Health Administration, DOL. At present, his principle work involves the investigation of whistle blower complaints. In a typical investigation, after receiving a discrimination complaint, Mr. Boyd contacts the complainant for an interview; subsequently, he also contacts the respondent in an attempt to settle the complaint or obtain a position statement. If necessary, Mr. Boyd will also make a site visit and conduct interviews. Eventually, Mr. Boyd will make a determination on whether the complaint has merit.

In Mr. Bryant's case, after discussing the complaint with him, Mr. Boyd contacted Mr. Mendenhall by telephone. At that time, Mr. Mendenhall first protested that Mr. Bryant was not his employee. Then, Mr. Mendenhall stated he terminated the contract because Mr. Bryant would only run the loads that he wanted to run.

Later, Mr. Boyd interviewed Mr. Mendenhall. Mr. Mendenhall presented two reasons for terminating Mr. Bryant's contract. As one basis for the termination, Mr. Mendenhall identified Mr. Bryant's refusal to drive on Sundays. At the same time, Mr. Mendenhall confirmed Mr. Bryant's statement that they had a verbal agreement that Mr. Bryant would not have to drive on Sundays.

As a second reason, Mr. Mendenhall stated he terminated Mr. Bryant's contract because he refused to take a trip to Smyrna, Georgia that was due to leave at 3:00 a.m. on November 27, 2002. Even though he was aware that Mr. Bryant needed an eight hour break after completion of his earlier trip on November 26, 2002, Mr. Mendenhall took the action because Mr. Bryant refused the dispatch anyway.

Mr. Boyd prepared a written statement of their conversation, which Mr. Mendenhall signed on March 26, 2003. Based on Mr. Mendenhall's written statement, Mr. Boyd concluded Mr. Bryant's discrimination complaint had merit.

PX 9 is a copy of Mr. Mendenhall's March 26, 2003 statement. Mr. Boyd prepared the statement on his lab top computer based on his interview with Mr. Mendenhall and then gave the statement to Mr. Mendenhall to review and correct, if necessary. Mr. Boyd asked Mr. Mendenhall to sign the bottom of every page to indicate that he had read the page. Mr. Boyd witnessed Mr. Mendenhall sign the document.

As part of his investigation, Mr. Boyd completed a back pay analysis based on Mr. Bryant's earnings at Bearden Trucking reduced by his subsequent interim employment earnings.

Mr. Boyd also spoke with Ms. Kim Cox at Bearden Trucking. She overhead portions of a conversation between Mr. Mendenhall and Mr. Bryant.

[Cross examination] Mr. Boyd took a signed statement from Ms. Cox but he doesn't recall whether he gave her a copy.

Mr. Boyd received Mr. Mendenhall's position statement, dated January 21, 2003 (RX 5), in which he gave his reasons for terminating Mr. Bryant. He read the document prior to finding Mr. Bryant's complaint had merit.

Mr. Boyd did not interview Mr. Salvo. He did contact other operators who may have had dealings with Mr. Bryant. Mr. Beaver was one of the individuals he contacted. Mr. Boyd doesn't recall suggesting to Mr. Beaver that he needed to make a complaint against Mr. Mendenhall.

When he interviewed Mr. Mendenhall, Mr. Boyd had a set of prepared questions. He acknowledged that a portion of the written statement indicated Mr. Mendenhall did not terminate Mr. Bryant for any safety reason. He was also aware that Mr. Mendenhall presented a comparison of other owner-operators' average earnings with Mr. Bryant's average earnings, which were lower. However, he did not believe that was a significant factor in Mr. Mendenhall's termination decision.

His initial calculation of back wages damages was $18,000.

[ALJ examination] Mr. Boyd is a federal employee, paid by U.S. Department of Labor. He did not know any of the participants prior to receiving Mr. Bryant's complaint.

Termination Letter
PX 1 and RX 3

In a letter addressed to Mr. Bryant, dated November 27, 2002, Mr. Mendenhall states that the contract between Bearden Trucking and Mr. Bryant is terminated as of that date, "[p]er our verbal agreement."

Christopher Trucks Letter
PX 2

In a letter, dated March 27, 2003, Mr. Bryant and a representative for Christopher Trucks acknowledge that Mr. Bryant returned a 1998 Freightliner truck on that day.

Agreement
PX 3

In a signed, written agreement, dated August 5, 2002, Bearden Trucking and Mr. Bryant set out the terms of their business relationship. Essentially, Mr. Bryant operated as an independent contractor providing trucking services to Bearden Trucking. Mr. Bryant agreed to be responsible for all operating costs, including taxes and fees, all maintenance costs, and all self-employment taxes. Mr. Bryant would not receive employee benefits from Bearden Trucking.

Both parties agreed to comply with applicable federal, state, and local laws, rules, and regulations, including DOT regulations.

Bearden Trucking agreed to pay Mr. Bryant within 15 days of receipt of trip documentation. At termination of the agreement, Bearden Trucking agreed to pay the final settlement within 90 days.

Hardaway Concrete Pay Stubs
PX 4 and PX 5

The pay stubs establish that over a 14 week period, March 30, 2003 to July 5, 2003, Mr. Bryant earned a total of $9,063. He earn $12 an hour for the first 40 hours and $18 for each overtime hour. From his taxable pay, approximately 7.65% of gross pay was deducted for medicare and social security taxes. The total deductions for all withheld taxes (social security, medicare, federal and state) ran approximately 20% of his taxable income.[5] Mr. Bryant varied the number of hours he worked each week. For a total of six weeks, Mr. Bryant worked between 32 and 36 hours. For that period, the average gross pay was $403.[6] During the other eight weeks, Mr. Bryant worked 56 or more hours. Focusing on those eight weeks, Mr. Bryant's average weekly gross pay was approximately $830.[7]

Income and Expenses
PX 6

Between December 16, 2002 and February 21, 2003, a period of nine weeks, Mr. Bryant reports his total gross income to be $6,885. The listed expenses of fuel, tolls, scale fees, insurance,

[5] A weekly deduction of $82.63 for "CS" started in the third pay period. Since I do not know the meaning of "CS," I have not included that figure as a part of the required deductions.

[6] $2,421/6.

[7] $6,638/8.

and "misc." total $3,363. The average weekly net income is $391. Mr. Bryant notes multiple deadhead trips and on the margins records a $1,800 truck payment.

Settlement Summaries
PX 7 and PX 8

For the period August 4, 2002 through December 1, 2002, in fifteen settlement summaries, Bearden Trucking paid Mr. Bryant a total of approximately $16,946 for mileage ($0.82 per mile) plus payments for stops, after deductions for fuel, advances, and handling fees.[8] The deductions included $660.07 for a truck repair on September 23, 2002. PX 8 also sets out check disbursements to Mr. Cladie Oxindine over approximately the same time, totaling $19,391.[9]

Mr. Bryant's monthly mileage is: 5,692 in August (three weeks); 8,048 in September, 8,432 in October; and, 4,396 in November.

Mr. Mendenhall's March 26, 2003 Written Statement
PX 9

On March 26, 2003, Mr. Mendenhall signed a five and a quarter page, double spaced, written statement commemorating his interview with Mr. Boyd. Mr. Mendenhall noted that in his initial response to the OSHA investigation, he presented the reason Mr. Bryant's contract was terminated: Mr. Bryant was unable, or did not want, to run the necessary miles that needed to be run "under the agreement." The other four owner-operators providing services to Bearden Trucking were paid an average of $1,500 based on mileage; for the same period, Mr. Bryant only earned an average of $1,052. At the time of the written statement, March 2003, Mr. Mendenhall no longer had any owner-operators working for him.

Mr. Mendenhall agreed with Mr. Bryant that he would not have to drive on Sunday mornings. However, when requested to take loads late Sunday or early Monday morning, Mr. Bryant would refuse. Mr. Bryant worked for Bearden Trucking as a company driver from April 27, 2001 to March 2, 2002. He was an owner-operator with an agreement with Bearden Trucking from March 2, 2003 to May 22, 2002 and August 2002 to November 2002.

Mr. Bryant called Mr. Mendenhall during the early morning of November 26, 2002 with a loading problem. Mr. Mendenhall told Mr. Bryant to take care of it. He talked to Mr. Bryant again on November 26, 2002 around 5:00 p.m. Although Mr. Bryant claims he first learned about the early

[8]Since the entry for a bill payment of $951.81 is not in the weekly summary, I have not included that check noted in the PX 8 summary for Mr. Bryant.

[9]I have not included the total payments to B.L. Enterprises and Mr. Jones Patrick because their disbursements did not cover the same period. I've excluded Piggyback Service Company because that owner-operator appears to have frequently provided more than one truck. Finally, I did not include the unidentified bill payment entry for Mr. Oxindine.

morning dispatch during this conversation, Mr. Mendenhall believed he had received the dispatch earlier. Mr. Mendenhall has not been able to verify that earlier notice. Mr. Bryant told Mr. Mendenhall that he had a safety concern about the 3:00 a.m. dispatch to Georgia on November 27, 2002. He indicated that he would not arrive back in Greenville, South Carolina until 10:30 p.m. and that he would be out of hours and needed an eight hour break. Consequently, the trip was reassigned to another driver. Mr. Bryant did not make the Georgia trip. Mr. Mendenhall agreed that Mr. Bryant was due an eight hour rest after he returned to Greenville on November 26th. Mr. Mendenhall did not terminate the contract because Mr. Bryant raised a safety concern.

In a telephone conversation on November 27, 2002, Mr. Mendenhall told Mr. Bryant the contract was terminated. When Mr. Bryant and his wife came to the office later in the day, he told Mr. Bryant the same thing. Mr. Mendenhall reviewed the statements by Mr. and Mrs. Bryant concerning the office visit. He denies that he answered "yes" to the following question: "[Y]ou are going to terminate the contract because I won't run over hours by going to Georgia?" Mr. Mendenhall would never say anything like that. He also doesn't "believe that on November 27, 2002, I said to him that I was terminating the contract because he didn't take the run to Georgia."

In response to Mr. Boyd's query to identify the "straw" for his decision, Mr. Mendenhall stated:

> Mr. Bryant was continually not being able to take the loads we needed him to take. Had he taken the dispatch to Georgia on the early morning of November 27, 2002, I still probably would have terminated Mr. Bryant's contract, but probably not right then as I did. . . essentially the refusal to take the trip to Georgia was the 'straw' for my decision.

Mr. Mendenhall never gave Mr. Bryant a written warning or notice about his dissatisfaction with his lack of income or inability to take necessary loads. Under their written agreement, he was not required to give such written notice. However, Mr. Mendenhall did have some conversations with Mr. Bryant about those issues.

For the Respondent

Sworn Testimony of Mr. Charles R. Beaver
(TR, pages 127 to 135)

[Direct examination] Mr. Beaver is the owner of the Piggyback Service Company in Charlotte, North Carolina. He has known Mr. Mendenhall, professionally and socially, since 1987.

In early 2003, he received a call from Mr. Boyd who was investigating Mr. Bryant's discrimination complaint against Mr. Mendenhall. Mr. Boyd asked him if Mr. Mendenhall had ever tried to get his operators to drive beyond the hours of service limits. Mr. Beaver told him no. Mr.

Boyd then indicated that if Mr. Mendenhall had engaged in that activity, a person could seek damages in the form of back wages and other things. When Mr. Beaver indicated he was not interested, Mr. Boyd seemed to become aggressive in his response. He indicated that based on Mr. Mendenhall's written statement, the complaint would probably go in favor of Mr. Bryant.

After the call, Mr. Beaver called Mr. Mendenhall and told him that Mr. Boyd seemed to think that he had Mr. Mendenhall for whatever had happened to Mr. Bryant.

[Cross examination] In his business, Mr. Beaver owns 12 trucks. He used to send three trucks to Bearden Trucking but now he provides only one vehicle.[10] Mr. Beaver pays the driver of the truck for the trip and Mr. Mendenhall pays him.

Mr. Beaver expects his drivers to comply with DOT regulations. He is not aware of any violations by his drivers. If a load can't get to its destination in compliance with the regulations, it arrives late.

Mr. Beaver has met Mr. Bryant and knew he was a driver for Mr. Mendenhall.

<u>Sworn Testimony of Ms. Kimberly H. Cox</u>
(TR, pages 136 to 160)

[Direct examination] Ms. Cox has been the office manager at Bearden Trucking since March 2002. In March 2003, she gave a statement to Mr. Boyd but did not receive a copy. She was aware of Mr. Bryant's employment with Bearden Trucking from August to November 2002.

In her opinion, Mr. Bryant was not as hard working as the other drivers. He was also undependable because at times he would accept a load in the morning and then call in the afternoon declining to take the trip. In response, Bearden Trucking would either have to change loads or use another driver for the trip.

Mr. Calhoun, Mr. Crook, and Mr. Oxindine were the other owner-operators at Bearden Trucking. They put in more hours because they worked on the weekends.

On the morning of November 27, 2002, Mr. Bryant came into to the office. He was calm and nice as usual. As he talked to Mr. Mendenhall, their conversation became heated. Because she was on the phone, she really did not know what was said. However, she believes it involved Mr. Bryant's termination.

She typed the termination letter for Mr. Mendenhall (RX 3). Mr. Mendenhall told Ms. Cox that he was terminating Mr. Bryant because he was undependable. He provided no further explanation. He did not mention anything about safety.

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[10]*See* PX 8 for disbursements to Piggyback Service Company.

Ms. Cox reviews the drivers' log books. During her review of Mr. Bryant's logs, she never observed him exceeding the 70 hour limit.

DOT regulations require verification of a driver's previous employment. Since Mr. Bryant left in November 2002, Ms. Cox has not received any calls about him from prospective employers.

Ms. Cox never observed a strained relationship between Mr. Bryant and Mr. Mendenhall.

About a week after November 27, 2002, Mr. Bryant returned to the office, jumped the half door entry, and had a loud and heated conversation with Mr. Mendenhall. The police were called.

Sometime between August and November 2002, Mr. Bryant told Ms. Cox that he was either behind or late with his truck payment. She doesn't recall the exact wording.

The summer is the company's busiest season.

Ms. Cox issued the paychecks. Mr. Bryant received 82 cents a mile plus $25 per additional stop. On occasions, Mr. Bryant received advances for truck repairs. Once, the advance was a thousand dollars.

[Cross examination] Ms. Cox asked Mr. Boyd for a copy of her written statement. However, the office is fast-paced and either she forgot to get the statement from him or he forgot to give it to her.

On occasions, other owner-operators at Bearden Trucking have turned down loads. She doesn't know the reasons why Mr. Bryant may have refused a load. She understood that Mr. Bryant would not work Sunday mornings so he could go to church. He has driven on Saturday and Sunday afternoons. On some weeks, Mr. Bryant worked more than other company drivers.

When she reviewed his log, Ms. Cox noted that Mr. Bryant went over the 10 hour driving limit on November 26, 2002 when he drove 11 hours.

Ms. Cox handles driver verifications and would know if a company had called in to verify Mr. Bryant's employment.

On November 27, 2002, nothing more happened than Mr. Mendenhall and Mr. Bryant raising their voices. A week later, when he came in, Mr. Bryant stated he had called the police.

[ALJ examination] When Mr. Bryant returned in August 2002, he was working really well for the first few weeks. However, by October, he was driving less. Mr. Bryant was off the first week in November for a family emergency. In such an emergency, the family comes first.

The last exchange between Mr. Mendenhall and Mr. Bryant concerned his paycheck. Mr. Bryant wanted the check at that time. However, Ms. Cox had not prepared it yet and Mr. Mendenhall observed that, under the contract, he had 30 days.

RX 6 is Ms. Cox's summary of Mr. Bryant's hours.

<u>Sworn Testimony of Mr. Craig Salvo</u>
(TR, pages 160 to 183)

Mr. Salvo has been with Bearden Trucking since 1989. He now works as a dispatcher in addition to Mr. Mendenhall. He is aware of the hours of service limitations.

Mr. Bryant was a good, conscientious driver but he turned down a lot of loads. Mr. Bryant had asked to be off work before 5:00 p.m. on November 27, 2002, the Wednesday before Thanksgiving. Mr. Salvo tried to accommodate him by scheduling an early eight hour round time to the Atlanta area on November 27th. On November 26th, about 11:00 a.m., while returning from Indiana, Mr. Bryant called Mr. Salvo and told him that due to a holiday traffic delay, he was worried about his time and believed that he would arrive late. Mr. Salvo reminded him about the dispatch the next morning and Mr. Bryant stated he did not believe he could take the load on November 27, 2002. He expressed an intention to call Mr. Mendenhall later in the day. Around 3:00 p.m., November 26, 2002, Mr. Salvo reassigned the Georgia trip to another driver.

Bearden Trucking is a small company in a highly competitive business. Consequently, customer loyalty is very important. Due to the limited number of trucks and drivers, it was sometimes difficult to cover every customer.

Mr. Salvo was aware that Mr. Mendenhall had decided to terminate Mr. Bryant's contract. Mr. Mendenhall did not mention either safety or Mr. Bryant's refusal to take the Smyrna trip as a reason for the action. In the months leading up to November, Mr. Bryant was running his truck less. That was a problem and Mr. Salvo considered Mr. Bryant to be almost a part-time driver.

The relationship between Mr. Mendenhall and Mr. Bryant was fair. Mr. Mendenhall would advance money to his drivers. Mr. Salvo was present when Mr. Bryant confronted Mr. Mendenhall about his pay check. Mr. Bryant jumped over the half door, ran to Mr. Mendenhall, and demanded to be paid. Mr. Bryant said not to bother with the police because he had already called them.

An owner-operator with a $1,700 a month truck payment needs to work 70 hours a week to make it. Some drivers with 1990 model trucks can get by with 50 to 60 hours. However, Mr. Bryant had a "nice fancy truck" with high monthly payments.

[Cross examination] Each day, prior to building the schedule, Mr. Salvo received a recap from Ms. Cox on the drivers' hours and who was close to the hours of service limits.

Mr. Salvo scheduled Mr. Bryant for the Smyrna, Georgia trip on the assumption that he would have returned from Indiana by 8:00 p.m. the night before, giving him about 8 hours rest. Had the Indiana trip gone as planned, Mr. Bryant would have been back by lunch on the 26th. He was delayed by a loading problem. Mr. Bryant made his request for the early, November 27th trip about two weeks before the date.

When Mr. Bryant called in at 11:00 a.m. on the 26th, Mr. Salvo told him that he still had the Georgia trip the next day. Mr. Bryant responded that he was running out of hours and would call Mr. Mendenhall. If other drivers run out of time, they also turn down loads.

When Mr. Bryant returned to work with Bearden Trucking in August 2002, he no longer wanted to take long trips. He would accept loads that departed late Sunday afternoon. Mr. Salvo believed Mr. Bryant was working less and less, so he would be surprised if in fact Mr. Bryant worked the same number of hours in September and October 2002.

Mr. Salvo was aware that Mr. Bryant was off the first week in November for a family emergency and off the another week the same month for a personal health issue.

The average driver at Bearden Trucking works 58 to 65 hours. Anything below 50 hours is considered part-time. At the same time, Mr. Salvo doesn't handle the logs so he is not completely sure about the actual amounts of driving time. The company had four owner-operators, ten drivers, and eleven or twelve trucks. Only one owner-operator, right before he quit, was part-time.

[ALJ examination] Mr. Salvo is really the sole dispatcher for Bearden Trucking. He learned that Mr. Bryant had been terminated some time after lunch on the 27th. He doesn't recall how he heard about the termination. The loss of a driver has a big effect on customer service.

<u>Sworn Testimony of Mr. Frances E. Mendenhall, III</u>
(TR, pages 194 to 238)

[Direct examination] Mr. Mendenhall is the owner of Mendenhall Holding Company. He has been in the trucking business 20 years and has owned Bearden Trucking for 16 years. Through his company, Mr. Mendenhall provides for-hire truck carrier service. He provides trucking for the southeast region of the United States and parts of the mid-west. His trucks carry a wide array of cargo including food stuffs. About 85% of his routes have a 250 mile radius which enables his drivers to go out and return the same day.

Bearden Trucking has two types of drivers. First, he employs company drivers who are actually his employees and eligible for fringe benefits. Mr. Mendenhall also uses owner-operators who are paid on a per mile basis and responsible for expenses associated with the truck.

Mr. Bryant worked for Bearden Trucking for about one year as a company driver. In March 2002, he purchased a truck and became an owner-operator for a couple of months. Then, Mr. Bryant left Bearden Trucking for another company. When that work did not produce enough money, Mr.

Bryant returned to Bearden Trucking in August 2002.

The end of summer, up to Christmas, was a busy time for his company which transported food, school books, and magazines. After a pretty good start, Mr. Bryant's hours of work stared to fade. When Mr. Bryant called in the first part of November with a family problem, Mr. Mendenhall told him to take care of the family situation. However, he also observed to Mr. Bryant that he was not holding up his end of the bargain. Mr. Bryant was authorized to work up to 70 hours a week, but he never did that. The most Mr. Bryant worked was in the high 50s.

Mr. Mendenhall operates in a very competitive business with about a 3% margin. He obtains business to cover the number of drivers. When one driver does not work as much, that puts a strain on the other drivers.

Mr. Bryant had a high scale tractor truck in comparison to the Bearden Trucking vehicles. If his net pay was $1,000 a week and his monthly truck payment was $1,700, then he was working two weeks a month just to pay for the truck.

When Mr. Bryant returned in August 2002, he stated that he could not work Sundays. Mr. Mendenhall agreed, perhaps too hastily. Nevertheless, he did agree to the Sunday limitation. Still, Mr. Mendenhall expected Mr. Bryant to be able to leave on trips Sunday afternoon or evening. Sometimes, Mr. Bryant did depart late Sunday.

Prior to the Indiana trip, Mr. Bryant had asked to be off the Wednesday before Thanksgiving. However, that was the end of the month and Bearden Trucking was very busy with end of the month deliveries. As a result, Mr. Bryant was scheduled to make a short run to Georgia early Wednesday morning. That assignment did not conflict with Mr. Bryant's Indiana trip. He was expected to leave Indiana the morning of November 26, 2002 no later than 9:00 a.m. Since the 500 mile trip should take no more than 10 hours, Mr. Bryant should have been back in Greenville around 6:00 p.m. However, Mr. Mendenhall recalls that Mr. Bryant had some logistical problems prior to leaving Indiana. When he called to indicate a late arrival, Mr. Salvo assigned someone else to the Georgia trip.

According to Mr. Mendenhall, "The decision to terminate the agreement was based on Domico's inability or desire not to run the necessary miles we needed for him to run, and to again not run on the weekends." By October and November, the number of hours Mr. Bryant worked had substantially diminished. Mr. Mendenhall doesn't recall ever putting an employee in a position to violate safety. Safety was not an issue in the termination of Mr. Bryant's agreement.

When Mr. Bryant called Wednesday morning about a settlement check, Mr. Mendenhall told him the check would be ready Friday and that he was terminating the contract. Later, when Mr. Bryant came to the office, Mr. Mendenhall stated the arrangement was not working out because Mr. Bryant was not able to work the necessary miles or work the weekends.

Mr. Bryant returned the next Wednesday demanding a settlement check. They had a heated conversation. Mr. Bryant got in front of Mr. Mendenhall demanding payment even though the check was not due for a couple of days. Mr. Mendenhall gave him the check. Eventually, the police came and gave Mr. Bryant a restraining order. The last settlement check was sent to Mr. Bryant in January 2003.

Mr. Boyd contacted him in January 2003 by telephone. He identified himself and explained Mr. Bryant had filed a complaint. Mr. Mendenhall was not actually sure who Mr. Boyd represented and he may not have been paying close attention. His first reaction was that the Department of Labor had no jurisdiction because Mr. Bryant was an independent contractor. But, he was wrong. Mr. Mendenhall doesn't recall the other portions of his response. However, he did send a statement to Mr. Boyd, dated January 21, 2003 (RX 5), which presented the specific reasons for Mr. Bryant's termination. That letter does not mention safety.

Mr. Mendenhall believes there is a significant difference between the average weekly pay of an owner-operator of $1,050 and $1,500.

In March 2003, Mr. Boyd came to Mr. Mendenhall's office for an interview. He had series of questions and conducted the interview in a question and answer format. Then, using his lap top computer, Mr. Boyd wrote a narrative summary of the interview which Mr. Mendenhall reviewed and signed (PX 9). Mr. Mendenhall set out in the last sentence of page one and the first paragraph of page two the reasons for terminating his agreement with Mr. Bryant. Mr. Mendenhall was able to read the statements by Mr. Bryant and his wife. The term "straw" came from Mr. Boyd and his questions. At the time Mr. Bryant called in from Indiana, Mr. Mendenhall was in the process of trying to find another driver. Mr. Mendenhall repeated, "I terminated Mr. Bryant's contract because he was unable to run the necessary miles, he was unable to work weekends. He expressed a safety concern and we remedied the problem." They assigned another driver to the Georgia trip.

After a phone conversation with Mr. Beaver, Mr. Mendenhall became convinced that Mr. Boyd was out to get him.

The pre-employment verification process is straight-forward and does not involve any opinion. No one called about Mr. Bryant. During his interview, Mr. Boyd stated Mr. Bryant was not working. As a result, Mr. Mendenhall was surprised to learn that Mr. Bryant had been working.

The demand for truck drivers is "huge." Mr. Bryant is a qualified driver who is a good candidate for the trucking industry. Mr. Mendenhall reviewed the Greenville classified ads from the Sunday paper from December 2002 to April 2003. The ads show the demand for truck drivers (RX 2). Mr. Bryant is fully capable of obtaining employment as a driver under the same conditions he experienced at Bearden Trucking.

In his termination letter to Mr. Bryant, Mr. Mendenhall did not say anything about his refusal to drive. Mr. Mendenhall doesn't believe that he violated the Act.

Based on his trucking experience and trucking industry standards, Mr. Mendenhall set out the various cost factors in operating a truck including repairs, maintenance, depreciation, taxes, and fringe benefits. He used a monthly truck payment of $1,500. Operators get between 82 and 84 cents a mile to run their trucks. A driver gets 32 cents a mile.

[Cross examination] Mr. Mendenhall made the job offer to Mr. Bryant in April 2003 because he needed qualified drivers and believed from Mr. Boyd that he was not working. Mr. Bryant would have been a company driver in a loaded, non-sleeper truck which means he would not drive over the weekends. A company driver also can not refuse loads and still keep his job.

Mr. Mendenhall doesn't know which classified ads Mr. Bryant may have seen. An unemployed, qualified truck driver should have been able to find work within a week. The industry standard requires a driver to have three years of experience and be at least 25 years old. He is not sure about the specific driver qualifications for various companies.

The person who replaced Mr. Bryant on the November 27th Georgia trip was a company driver.

In August and September, Mr. Bryant worked about the same as other drivers. In October, while he may have exceeded the average on occasion, week by week, he consistently drove less than the other drivers. Even though Mr. Bryant had valid reasons in November to be away, his two week absence was a significant problem for Bearden Trucking.

Mr. Mendenhall was aware that Mr. Bryant had a service and maintenance warranty. However, he also knows Mr. Bryant had to repair his transmission. On one occasion, Mr. Mendenhall advanced Mr. Bryant $600 as half of a repair bill. That advance should show up in the settlement documents.

RX 4 represents industry standards for expenses such as depreciation and tire replacement. Since the figures are averages, he believes trucks operating under warranties have been included in the averages. Some operators make the mistake of considering their income to be whatever is left over after gas and oil expenses and truck payments. That's incorrect. Operators need to add further deductions for taxes and recurring maintenance expenses.

Mr. Mendenhall admits not all employers comply with the DOT regulations requiring pre-employment verification checks.

Even if the November 26, 2002 refusal to drive incident had not occurred, Mr. Mendenhall would probably still have terminated Mr. Bryant, just not right then. Mr. Mendenhall "would have tried to have somebody in a position to be able to run the miles that we needed him to run and he was unable to run." He did make the comment about the "straw," but that was a mistake and has been taken out of context. The real reasons he terminated Mr. Bryant are set out in the first couple of pages of his statement (PX 9).

[ALJ examination] Based on their written contract, at the time of the termination, Mr.

Mendenhall believed Mr. Bryant was an independent contractor.

Mr. Mendenhall had a verbal agreement with Mr. Bryant about Sundays. However, the situation changed. At the same time, he did not re-negotiate his verbal contract with Mr. Bryant.

When he terminated Mr. Bryant, Bearden Trucking was short a driver. He still took the action because it was better not to depend on Mr. Bryant and then have him not come through. Mr. Bryant had become undependable the beginning of November.

The traffic and logistic problems that occurred on Mr. Bryant's Indiana trip were not his fault.

Mr. Mendenhall doesn't recall the exact moment he made the termination decision. Mr. Mendenhall did not ask Mr. Bryant to do anything illegal.

[Re-direct examination] Mr. Mendenhall made the April 2003 job offer in part to preclude a claim for continuing damages.

<u>Owner-Operator Comparison Chart</u>
RX 1

For each week in September, October, and November 2002, the number of hours worked by the five owner-operators is compared. In September, Mr. Bryant had the least hours one week and the most hours another week. For another week, only one owner-operator put in more time than Mr. Bryant. For the other two weeks, three of the owner-operators worked more than Mr. Bryant.

In October, the results were again mixed. In the first week, Mr. Bryant was in the middle. In the third week, only one owner-operator put in more time than him. In the second week, Mr. Bryant ranked number 3 out of 5. And, in the last week, Mr. Bryant had the least time.

In November, Mr. Bryant had the least time each week except for the second week when he was second to last.

<u>Classified Help Wanted Ads</u>
RX 2

RX 2 contains a portion of the help wanted ads from the Greenville News for each Sunday from December 1, 2002 through April 27, 2003 related to Trucking/Transportation. The ads consistently present multiple job offerings for both drivers and owner-operators with travel limited to the southeastern and southern regions of the United States. Many job openings are presented for local truck drivers.

Owner-Operator Expenses
RX 4

Between August 5, 2002 and November 27, 2002, Mr. Bryant drove 28,772 miles as an owner operator, which represents an average of 1,798 miles a week. Based on the American Trucking Association Benchmark Guide, after indicating weekly driver's pay to be $575 ($0.32 a mile), Mr. Mendenhall estimated Mr. Bryant's weekly operating expenses to be as follows:

Maintenance	$ .024/mile	$ 43	
Depreciation	.076	136	
Tires	.022	40	
License	.011	20	
Insurance	.005	9	
Other expenses	.029	52	
Other taxes		30	
Truck payment			350
		$680	

Mr. Mendenhall's Letter
RX 5

On January 21, 2003, Mr. Mendenhall sent a letter to Mr. Boyd explaining the termination of Mr. Bryant's contract. The contract was terminated because Mr. Bryant was unable, or did not want, to drive the necessary miles for owner-operators to run under the agreement. His average earnings were 50% less than the average earnings of the other four owner-operators driving for Mr. Mendenhall. Additionally, Mr. Bryant was unable, or did not want, to work on the weekends.

Mr. Mendenhall observed that when Mr. Bryant raised a safety concern about a scheduled dispatch, another driver was assigned the trip and completed the delivery on time. The contract was not terminated for any safety reason.

Operating Hours Summary
RX 6

A summary of Mr. Bryant's daily operating hours shows that in September he worked 1.25 hours on one of the five Sundays that month. He did not work any Saturday. In October, Mr. Bryant did not work on any weekend. From November 1 through November 27, 2002, Mr. Bryant drove 1.25 hours on one of the four Sundays. He did not work any Saturday. Between October 26 and November 2, 2002 and November 13 through November 17, Mr. Bryant did not operate his truck. From November 18, 2002 through November 26, 2002, Mr. Bryant recorded 68.25 hours on-duty for Bearden Trucking. From November 1 through November 26, 2002, Mr. Bryant did not drive the following days: 1, 2, 3, 9, 10, 11, 13, 14, 15, 16, 17, and 23.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In his complaint, Mr. Bryant is alleging retaliatory discrimination in the nature of the termination of his contract with Bearden Trucking based on the claimed protected activity of refusing to accept a dispatch to Georgia, scheduled for the early morning of November 27, 2002, due to DOT hours of service limitations. As a first step in the adjudication process associated with his complaint, I will make specific factual findings. Within double brackets (**[[-]]**) in the following specific findings, I will discuss in detail my assessment of any significant testimonial conflicts. Following my determinations of fact in this case, I will then set out the adjudication principles and apply them to the established facts.

Specific Findings

May 2001 to February 2002 With several years of experience, Mr. Bryant joins Bearden Trucking as a local tractor-trailer driver. At the rate of $11 an hour, plus fringe benefits, he earns between $750 and $1,100 a month. Mr. Mendenhall and Mr. Bryant agree that he will not have to drive Sunday mornings. Later, when the company changes its compensation system to a flat rate per stop, plus fringe benefits, Mr. Bryant earns between $450 and $650 a week. In February 2002, Mr. Bryant purchases a 1998 Freightliner tractor truck in good condition and finances the purchase through the dealer. He also purchases a maintenance warranty. Mr. Bryant's monthly truck payments are about $1,800.

At this time, and continuing through July 14, 2003, Bearden Trucking is motor carrier transporting products across state lines and operating a seven day a week schedule. As a result, under the DOT regulations, 49 C.F.R. § 395.3 (b) (2), Mr. Bryant may be on duty no more than 70 hours in eight days.[11] Mr. Bryant is also subject to 49 C.F.R. § 395.3 (a) which states, "[N]o motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive: (1) more than 10 hours following 8 consecutive hours off duty. . ."

March 2002 After receiving necessary licenses, Mr. Bryant starts driving for Bearden Trucking as an owner-operator. He functions as an independent contractor and becomes responsible for his own expenses. Mr. Bryant no longer received employee fringe benefits.

June 2002 Mr. Bryant leaves Bearden Trucking to work for another company as an owner-operator.

August 5, 2002 After losing money with the other company, Mr. Bryant returns to Bearden Trucking and signs an agreement to work as an owner-operator. Under the contract, Mr. Bryant

[11]As I informed the parties at the hearing, I take judicial notice of the applicable DOT regulations establishing the hours of service limitations for drivers (TR, pages 57 and 58).

operates as an independent contractor providing trucking services to Bearden Trucking. As an independent contractor, Mr. Bryant is responsible for all operating expenses. He is paid 82 cents a mile. Mr. Bryant does not receive any employee benefits from Bearden Trucking. Verbally, Mr. Mendenhall and Mr. Bryant again agree that Mr. Bryant will not have to drive on Sundays.

August 2002 In three weeks, Mr. Bryant drives a total of 5,692 miles for an average weekly mileage of 1,897.

September 2002 In four weeks, Mr. Bryant drives a total of 8,048 miles for an average weekly mileage of 2,012. In one weekly settlement, Bearden Trucking deducts $660 from Mr. Bryant's settlement check for repayment of a September 23, 2002 truck repair advance.

October 2002 In four weeks, Mr. Bryant drives 8,432 miles for an average weekly total of 2,108.

November 2002 In four weeks, Mr. Bryant drives a total of 4,396 miles, for a weekly average of 1,099. Mr. Bryant does not drive the following days: November 1, 2, 3, 9, 10, 11, 13, 14, 15, 16, 17, 23, and 27 through 31, a total of seventeen days. For the fourteen days he drove, Mr. Bryant averaged 314 miles a day, representing an average weekly mileage of 2,198.[12]

[[Based on a request to be off work the Wednesday before Thanksgiving, Mr. Mendenhall believed Mr. Bryant was assigned the early morning, November 27, 2002, Georgia dispatch prior to going on the Indiana trip. Mr. Bryant states the first time he was aware of the Georgia trip was when he called in on November 26, 2002. Mr. Salvo, the company dispatcher, recalls that in his morning telephone conversation with Mr. Bryant on November 26, 2002, he reminded Mr. Bryant of the November 27th early morning Georgia dispatch. In response, Mr. Bryant indicated that he was running late, couldn't take the trip to Georgia, and would call Mr. Mendenhall later in the day. Mr. Salvo also explains he assigned Mr. Bryant the Georgia trip about two weeks earlier in an attempt to accommodate Mr. Bryant's request to be off work by 5:00 p.m., November 27, 2002, the Wednesday before Thanksgiving. Had Mr. Bryant experienced no delays on the Indiana trip, his planned arrival in Greenville, South Carolina, on November 26, 2002, during the late afternoon/early evening would have provided a sufficient rest period to enable Mr. Bryant to start the short trip to Georgia at 3:00 a.m. the next day.

Due to the specifics of Mr. Salvo's testimony regarding the scheduling of the Georgia trip, as corroborated by Mr. Mendenhall's hearing testimony, and the detail Mr. Salvo recalls about his morning conversation with Mr. Bryant on November 26th, I find his recollection of the dispatch sequence and morning conversation to be the most reliable version.**]]**

Prior to November 26, 2002 Mr. Bryant asks to be off work by 5:00 p.m, November 27, 2002, the Wednesday before Thanksgiving. To accommodate his request, Mr. Salvo, the company

[12] 4,396/14 and 314 x 7.

dispatcher, schedules Mr. Bryant for a short eight hour round trip to Georgia, departing at 3:00 a.m. on November 27, 2002.

November 26, 2002 Mr. Bryant has a planned return trip from Lebanon, Indiana to Greenville, South Carolina of about 500 miles that will take about ten hours with a morning departure time of about 9:00 a.m. However, during the early morning hours, prior to starting the return trip to Greenville, South Carolina, Mr. Bryant is confronted with a loading problem. After resolving the problem, he informs Mr. Mendenhall of the loading issue around 4:30 a.m. and drives 30 minutes prior to stopping to sleep. When he wakes up at 10:30 a.m., Mr. Bryant departs for Greenville, South Carolina. At about that time, Mr. Bryant talks with Mr. Salvo who reminds Mr. Bryant of the early morning trip to Georgia the next day. Mr. Bryant expresses his belief that he will not be able to take the Georgia trip because he has been delayed in his return trip to Greenville, South Carolina. Mr. Bryant indicates that he will call Mr. Mendenhall later in the day.

Subsequently, in Kentucky, Mr. Bryant is further delayed by heavy traffic, a fuel stop and a one hour rest period Around 4:00 p.m., he calls Mr. Mendenhall and informs him of the delay and his estimated late arrival in Greenville, South Carolina of about 10:30 p.m. At that time, Mr. Bryant tells Mr. Mendenhall that he has a safety concern about his assigned Georgia trip on November 27th because his late arrival into Greenville, South Carolina will put him at his 10 hour driving limit. Mr. Mendenhall eventually replies "okay." In the meantime, about an hour earlier, Mr. Salvo reassigns the 3:00 a.m., November 27, 2002, Georgia dispatch to another driver. Mr. Bryant arrives in Greenville, South Carolina at 10:30 p.m.

[[According to a summary by Bearden Trucking, Mr. Bryant was on-duty a total of 14.25 hours (RX 6). Based on his testimony, Mr. Bryant's total is somewhat different. Because the company loading the truck the early morning of November 26, 2003 required him to be present, Mr. Bryant was on-duty in his cab as the day began at midnight. From 3:00 a.m. to 4:30 a.m, Mr. Bryant was actively engaged in reloading the truck. At 4:30 a.m., he departed Lebanon, Indiana and drove half a hour to Blacklands, Indiana, where he went off-duty at 5:00 a.m. to sleep. At this point, his hourly totals for November 26, 2002 were: 5 hours on-duty; 0.5 hours driving. At 10:30 a.m., he started his return trip to Greenville, South Carolina and arrived at 10:30 p.m. During that period, he stopped for a one hour, off-duty break. As a result, his daily totals were: 16 hours on-duty and 11.5 hours driving.[13] Although there is a discrepancy between Bearden Trucking's summary and Mr. Bryant's recollection concerning the on-duty time, the key figure in this dispute is Mr. Bryant's hours of driving.**]]**

At 10:30 p.m, November 26, 2002, under the DOT hours of service regulation, 49 C.F.R. § 395.3 (a) (1), having driven at least 10 hours by the time of his arrival in Greenville, South Carolina, Mr. Bryant cannot accumulate more driving hours until he has completed 8 consecutive hours of rest.

[13]I note that 49 C.F.R. §§ 395.1 (b) and 395.2 permit a driver to exceed the 10 hours driving maximum limit by up to 2 hours to complete a trip if he encounters unexpected, adverse driving conditions, such as unusual traffic.

As a result, Mr. Bryant could not resume driving for Bearden Trucking until 6:30 a.m., November 27, 2002.

November 27, 2002 **[[**Mr. Bryant and Mr. Mendenhall have two conversations in the morning of this day. The first exchange occurs in a telephone call between Mr. Bryant and Mr. Mendenhall. The second conversation occurs later in the Bearden Trucking office. Mrs. Bryant and Ms. Cox are present in the office.

According to Mr. Mendenhall, after telling Mr. Bryant he could pick up his settlement check on Friday, all he said during the first conversation was that Mr. Bryant's contract was terminated. In the second exchange in the office, Mr. Mendenhall also informed Mr. Bryant he terminated the contract since things were not working out because Mr. Bryant was not running the necessary miles.

Mr. Bryant's version of both conversations includes an additional statement and affirmation by Mr. Mendenhall. In the telephone conversation, Mr. Bryant asked Mr. Mendenhall why he was terminating the contract. Mr. Mendenhall replied because Mr. Bryant refused the Georgia dispatch. Mr. Bryant asked a follow-on question - you terminated the contract because I refused a load that would have put me over my hours of service? Mr. Mendenhall replied, "yes." Later, according to Mr. Bryant, in their office conversation, Mr. Mendenhall again stated the contract was terminated because he refused the load to Atlanta.

In resolving this testimonial dispute, I first note that both Mr. Bryant and Mr. Mendenhall presented their respective versions to me with conviction and without reservation. Second, the witnesses to the second conversation in the Bearden Trucking office provide no help. Mrs. Bryant did not testify. Ms. Cox observed the heated conversation, but she was distracted by her work and didn't hear any specifics.

Consequently, I look to other aspects of the record to determine what words were exchanged between Mr. Mendenhall and Mr. Bryant on the morning of November 27, 2002.[14] Through this process, while that the parties' respective recollections may be affected by the fog of litigation, I conclude that Mr. Bryant's presentation is more credible and consistent with all the evidence in the record.

Prior to placing the call to Mr. Mendenhall on Wednesday morning, November 27, 2002, Mr. Bryant had little reason to suspect that his contract with Bearden Trucking was in peril. The loading problem and heavy traffic which delayed his return to Greenville, South Carolina the previous day were not his fault. The departure delays were going to cause him to arrive in Greenville later than planned, which in turn would clearly prevent Mr. Bryant from obtaining the required 8 hours rest under the hours of service limitations prior to the scheduled 3:00 a.m. dispatch. Consequently, his reasons for refusing the Georgia dispatch were both legitimate and understandable. Additionally,

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[14]Concerning witness credibility, all factual findings, including credibility findings must be supported by substantial evidence in the record as a whole. *NLRB v. Cutting, Inc.* 791 F.2d 659, 667 (7th Cir. 1983).

since he was responsible for the financial obligations associated with his truck, the apparent purpose of Mr. Bryant's Wednesday morning phone call to Mr. Mendenhall was to obtain some certainty about his immediate financial condition. With these factors in mind,[15] I find exceptionally believable that the following sequence occurred during that phone call: when Mr. Mendenhall told him that his contract was terminated, Mr. Bryant asked "why?"

Correspondingly, based on other record evidence, I also believe Mr. Mendenhall responded by telling Mr. Bryant his refusal to take the Georgia dispatch was the reason. From Mr. Mendenhall's perspective, as corroborated by Mr. Salvo, the fall was a busy time for Bearden Trucking. He did have a legitimate concern about the drop-off in Mr. Bryant's availability the first two weeks in November. By refusing the Georgia dispatch, Mr. Bryant was once again unavailable. As a result, it is not surprising that Mr. Mendenhall would name the dispatch refusal as the termination reason. Additionally, Mr. Mendenhall's response to Mr. Bryant's query for an explanation during the Wednesday morning phone call is consistent with both his March 26, 2003 written statement and his July 2003 hearing testimony that Mr. Bryant's dispatch refusal was the triggering incident for his termination decision.

For similar reasons, I also conclude a) Mr. Bryant expressed his disbelief by asking Mr. Mendenhall to confirm his dispatch refusal due to the hours of service limitation was the reason; and, b) Mr. Mendenhall replied, "yes."

Turning to the second exchange in the Bearden Trucking office, I accept both recollections of Mr. Bryant and Mr. Mendenhall. That is, for the reasons just discussed, I believe that Mr. Mendenhall repeated that Mr. Bryant's dispatch refusal was the cause of the termination. However, I also find, based on his productivity concerns, Mr. Mendenhall provided further explanation by stating their arrangement was not working out because Mr. Bryant was not driving enough. I reach this conclusion because Mr. Bryant didn't really dispute whether anything else was said in their notably heated conversation in the office and Mr. Mendenhall did have legitimate business concerns about Mr. Bryant's availability.**]]**

In the morning, November 27, 2002, Mr. Bryant calls Mr. Mendenhall to inquire whether the next settlement check may be picked up that day or the day after Thanksgiving. After indicating the check may be picked up on Friday, Mr. Mendenhall tells Mr. Bryant that his contract with Bearden Trucking is terminated. Mr. Bryant asks Mr. Mendenhall "why"? Mr. Mendenhall states Mr. Bryant's refusal to take the Georgia dispatch is the reason. Then, Mr. Bryant asks if the termination is due to his refusal to take the Georgia trip which would have put him over his hours of service. Mr. Mendenhall replies "yes." Later in the morning, Mr. Bryant, accompanied by his wife, goes to the Bearden Trucking office. Mr. Mendenhall again tells Mr. Bryant he made his decision based on the refusal to take the Atlanta trip. Mr. Mendenhall further explains that their arrangement was not

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[15]Correspondingly, within this context, Mr. Mendenhall's version of the Wednesday morning telephone conservation seems highly unlikely. Mr. Bryant called to find out when he could pick up his settlement check. Mr. Mendenhall told him he could pick it on Friday. Next, Mr. Mendenhall told Mr. Bryant his contract is terminated. Then, apparently, Mr. Bryant and Mr. Mendenhall said "goodbye."

working out since Mr. Bryant was not running the necessary miles or working weekends.

December 2002 through February 21, 2003 A week after his termination, Mr. Bryant looks for other work. On December 16, 2002, Mr. Bryant starts working as an owner-operator for Thomas Enterprises. Over the next nine weeks, he receives a total of $6,885, representing 80% of the gross for each load. His expenses of fuel, tolls, scale fees, insurance and miscellaneous total $3,363. Due to an insufficient number of loads. Mr. Bryant begins looking for other work as an owner-operator. Mr. Bryant stops working for Thomas Enterprises on February 21, 2003. At the end of February 2003, Mr. Bryant's truck license expires.

The Greenville Sunday newspaper want ads contains multiple job opportunities for local truck drivers and owner-operators.

March 2003 Mr. Bryant looks for work as a company driver, concluding he can no longer continue as an owner-operator. On March 27, 2003, Mr. Bryant returns his tractor to the truck dealer.

The Greenville Sunday newspaper want ads contains multiple job opportunities for local truck drivers and owner-operators.

April 4, 2003[16] Mr. Bryant declines Bearden Trucking's offer of reinstatement as a company driver because he believes he will earn more as a company driver for Hardaway Concrete.

March 30, 2003 through July 5, 2003 Mr. Bryant earns $12 an hour, plus benefits, as a driver for Hardaway Concrete. For each overtime hour, Mr. Bryant receives $18. When working in the range of mid-30 hours a week, Mr. Bryant earns an average gross pay of $403. During the weeks he operated 56 or more hours, Mr. Bryant's average gross income is $830.

From March 30, 2003 through April 27, 2003, the Greenville Sunday newspaper want ads contains multiple job opportunities for local truck drivers.

Adjudication Principles

The employee protection provisions of the STAA, 49 U.S.C. §31105, prohibit the discriminatory treatment of employees who have engaged in certain activities related to commercial motor vehicle safety. Under 49 U.S.C. §31105 (a) (1) (A), an employee is protected if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. The U.S. Department of Labor interprets this provision to include internal complaints from an employee to an employer. DOL's interpretation that the statute includes

[16]Neither party has presented evidence of the exact date of Mr. Bryant's declination. However, in his May 9, 2003 decision letter, the Regional Administrator states the offer was made on April 4, 2003,which is consistent with the evidence before me that the offer and refusal occurred in early April 2003.

internal complaints "is eminently reasonable." *Clean Harbors Environmental Services, Inc. v. Herman* 146 F.3d 12 (1st Cir. June 10, 1998) (case below 1995 STA 34[17]). The U.S. Circuit Court of Appeals also stated internal communications, particularly if oral, must be sufficient to give notice that a complaint is being filed and thus that the activity is protected. There is a point at which an employee's concerns and comments are too generalized and informal to constitute "complaints" that are "filed" with an employer within the meaning of the STAA. *Id.*

An additional two types of employee activity are also protected under the STAA. Title 49 U.S.C. §31105 (a) (1) (B) (i) provides protection for an employee who refuses to operate a vehicle in violation of any federal rules, regulations, standard, or orders applicable to commercial vehicle safety or health. And, 49 U.S.C. §31105 (a) (1) (B) (ii) protects an employee who refuses to operate a commercial motor vehicle which he or she reasonably believes would cause serious injury to the employee or the public due to its unsafe condition. The Secretary, DOL, through the Administrative Review Board ("ARB"), has determined that if an employee makes an objection regarding an unsafe condition and then actually drives the vehicle, the complaint should be more properly analyzed under the "complaint" provision of 49 U.S.C. § 31105 (a)(1)(A). *Zurenda v. J & K Plumbing & Heating Co., Inc.* 1997 STA 16 (ARB, June 12, 1998). In addition, the complainant must prove that an actual violation of a regulation, standard, or order would have occurred if he or she actually operated the vehicle. *Brunner v. Dunn's Tree Service*, 1994 STA 55 (Sec'y Aug. 4, 1995).

In order to invoke the whistle blower provisions of the STAA, a complainant has the burden of proof to establish the respondent took adverse employment action because the complainant engaged in one of the STAA's protected activities. The analysis for determining whether a complainant meets his or her burden of proof is derived from the long, and continuing, line of federal employment law discrimination cases.

As set out in exhaustive detail by the U.S. Circuit Court of Appeals for the Eleventh Circuit, in *Wright v. Southland Corp.*, 187 F. 3d 1287 (11th Cir. 1999), a complainant may take two fundamental approaches to establish unlawful discrimination. First, relying on the traditional approach, a complaint may attempt to prove by direct evidence that more likely than not, the employer engaged in unlawful discrimination. *Id.* at 1289. If in response, the employer also provides evidence of legitimate purposes for its actions, then the case becomes a "mixed motive" case and the burden of persuasion shifts to the employer to demonstrate, as an affirmative defense, by a preponderance of the evidence, that it would have taken the same action, in the absence of the discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 to 255 (1989) and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).

Since directly proving an employer's intent of illegal discrimination may be difficult, the U.S. Supreme Court developed a second approach that enables a complainant to present a rebuttable

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[17]The decisions by the Secretary, U.S. Department of Labor, and the Administrative Review Board concerning STAA complaints are identified by year (<u>1995</u> STA 34), case type (1995 <u>STA</u> 34), and case number (1995 STA <u>34</u>) and are available at http://www.oalj.dol.gov/libwhist.htm.

presumption of illegal discrimination. *See Wright*, 187 F. 3d at 1290 and *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973). The ARB has applied this approach in STAA cases, and in *Byrd v. Consolidated Motor Freight*, 1997 STA 9 at 4-5 (ARB May 5, 1998), recently summarized the burdens of proof and production in this type of case:

> A complainant initially may show that a protected activity likely motivated the adverse action. *Shannon v. Consolidated Freightways*, Case No. 96-STA-15, Final Dec. and Ord., Apr. 15, 1998, slip op. At 5-6. A complainant meets this burden by proving (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment action, and (4) the existence of a "causal link" or nexus, e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Shannon*, slip op. at 6; *Kahn v. United States Sec'y of Labor*, 64 F. 3d 261, 277 (7th Cir. 1995). A respondent may rebut this *prima facie* showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action and that the protected activity was the reason for the action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993).

The ARB in a footnote to the above paragraph provided further explanation on this last phase of the adjudication process:

> Although the "pretext" analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant, throughout the proceeding. Once a respondent produces evidence sufficient to rebut the "presumed" retaliation raised by the *prima facie* case, the inference "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question." *St. Mary's Honor Center*, 509 U.S. at 510-511. *See Carroll v. United States Dep't of Labor*, 78 F. 3d 352, 356 (8th Cir. 1996) (whether the complainant previously established a *prima facie* case becomes irrelevant once the respondent has produced evidence of a legitimate nondiscriminatory reason for the adverse action).

The United States Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.* 120 S. Ct. 2097 (2000), provided further explanation of the pretext phase of the analysis introduced in the *St. Mary Honor Center* case. The court first reiterated that if an employer articulated a non-discriminatory reason for the challenged adverse action, the complainant retains the ultimate burden to show the stated reason is pretext for unlawful discrimination. In meeting that ultimate burden, the complainant may, but not necessarily, prevail based on the combination of a *prima facie* case and sufficient evidence to demonstrate the asserted justification is false. In light of the false justification, the trier of fact may conclude the employer engaged in unlawful discrimination. *Reeves*, 120 S. Ct. at 2108. In other words, there may be an inference that the employer's falsehood is an attempt to cover up the unlawful discrimination.

Discussion

Based on the evidence presented in this case, Mr. Bryant's complaint is best analyzed as a traditional case described by the *Wright* court. Mr. Bryant is attempting to prove through the preponderance of the direct evidence that Bearden Trucking engaged in unlawful discrimination against him. As explained above, an employer may not take adverse action, such as discharge from employment, against an employee for engaging in statutorily defined activity, 49 U.S.C. §31105 (a) (1). One such protected activity, under 49 U.S.C. §31105 (a) (1) (B) (i), is an employee's refusal to operate a vehicle in violation of any federal rules, regulations, standard, or orders applicable to commercial vehicle safety or health. Under these provisions, to establish unlawful discrimination, Mr. Bryant must prove several elements: applicability of the Act, protected activity, an adverse action, and causation.

In response, in addition to contesting the direct evidence, Bearden Trucking has presented evidence of legitimate business reasons for the termination of Mr. Bryant's contract. To prevail with its affirmative defense, Bearden Trucking must demonstrate by a preponderance of the evidence that it would have terminated Mr. Bryant's contract, in the absence of the discrimination.

Unlawful Discrimination

Applicability

On November 26, 2002, as a commercial motor carrier, Bearden Trucking was an employer subject to the employee discrimination provisions of the STAA. In a similar manner, as an independent contractor driving for Bearden Trucking on that day, Mr. Bryant fell within the Act's definition of "employee" *See* 29 C.F.R. § 1978.101 (d).

Protected Activity

Due to loading problems and a traffic delay, both beyond his control, Mr. Bryant determined around 4:00 p.m. on November 26, 2002 that he would not complete his return trip to Greenville, South Carolina until 10:30 p.m. Due to the delays, Mr Bryant believed that upon his arrival he would have reached his 10 hour driving limit under the DOT regulations and must rest for 8 consecutive hours. So, in the afternoon of November 26, 2002, Mr. Bryant informed Mr. Mendenhall that he was not be able to take a dispatch to Georgia on November 27, 2002 scheduled for 3:00 a.m.

As he anticipated, Mr. Bryant arrived in Greenville, South Carolina on November 26, 2002, at 10:30 p.m. During the course of the return trip to Greenville, Mr. Bryant had reached his maximum driving limit under the provisions of 49 C.F.R. § 395.3 (a) (1). According to the regulation, having reached the 10 hour driving limit, Mr. Bryant is prohibited from driving until he has acquired 8 consecutive hours of rest. Had Mr. Bryant accepted the Georgia dispatch and started driving at 3:00 a.m. onNovember 27, 2002, he would have violated 49 C.F.R. § 395.3 (a) (1) by continuing to acquire driving hours in excess of 10, without any warranted exceptions, since he last had 8 consecutive hours off-duty. Consequently, Mr. Bryant's refusal to take the 3:00 a.m dispatch was a protected activity under the Act.

Adverse Action

On August 5, 2002, Mr. Bryant entered into a contract with Bearden Trucking to provide driving services as an independent owner. Under the contract, over the course of the next sixteen and a half weeks, Mr. Bryant received nearly $18,000 for his transportation services. In morning of November 27, 2002, Mr. Mendenhall terminated Bearden Trucking's contract with Mr. Bryant, effective that day. Since the contract termination effectively acted as a discharge of Mr. Bryant from employment, it was an adverse action under the Act.

Causation

Around 4:00 p.m., November 26, 2002, Mr. Bryant informed Mr. Mendenhall of his refusal to accept the early morning Georgia dispatch due to regulatory hours of service limits. With no other intervening event, the next morning, on November 27, 2002, Mr. Mendenhall took the adverse action of unilaterally terminating Bearden Trucking's contractual relationship with Mr. Bryant. Standing alone, these facts represent strong circumstantial evidence that Mr. Bryant's protected activity caused the adverse action the next day.

Notably, the circumstantial evidence of causation does not stand alone. Mr. Mendenhall has admitted that Mr. Bryant's declination of the November 27, 2002 dispatch was the triggering event for his decision to terminate the contract. As I have determined in the specific findings, on the morning of November 27, 2002, Mr. Mendenhall told Mr. Bryant that the contract was terminated because he refused to drive the Georgia trip. Subsequently, in a March 26, 2003 written statement, prepared by Mr. Boyd, signed by Mr. Mendenhall, he states:

> Mr. Bryant was continually not being able to take the loads we needed him to take. Had he taken the dispatch to Georgia on the early morning of November 27, 2002, I still probably would have terminated Mr. Bryant's contract, but probably not right then as I did. . . essentially the refusal to take the trip to Georgia was the 'straw' for my decision.

At the hearing, Mr. Mendenhall expressed two concerns related to that statement. First, he questioned the manner and methods employed by Mr. Boyd during his investigation of the complaint. Essentially, due to Mr. Boyd' zealous approach, coupled with the information Mr. Mendenhall received from Mr. Beaver, Mr. Mendenhall believed Mr. Boyd was out to get him. In response, I simply observe that regardless of Mr. Boyd's interest in the case, the OSHA investigator did not force Mr. Mendenhall to sign the March 26, 2003 statement. Mr. Mendenhall also had the opportunity to either correct any portion of Mr. Boyd's written summarization or refuse to sign the document if it was incorrect.

Second, Mr. Mendenhall asserts that the statement is taken out of context and not integrated with other portions of the written statement which set out his actual reasons for terminating the contract. While I will later discuss Mr. Mendenhall's stated reasons for the termination action, I note the first sentence of his answer quoted above essentially summarizes the reasons set out earlier in his March 26, 2003 statement. Thus, rather than being taken out of context, the statement itself establishes that while Mr. Mendenhall may have been contemplating termination of the contract for business reasons, the timing of his termination decision was directly linked to Mr. Bryant's dispatch refusal on November 26, 2003.

Ultimately, despite Mr. Boyd's purported bias and Mr. Mendenhall's context objection, Mr. Mendenhall has not denied the accuracy of the quote from his March 2003 written statement. At the hearing, Mr. Mendenhall was asked, "You clearly stated - you told Mr. Boyd that essentially, a refusal to take the trip to Georgia was the straw for my decision. Correct?" Mr. Mendenhall replied, "That is what I said in that paragraph. . . [Mr. Boyd] put that in - - <u>yes, I did say that</u>, but as I said, that is just one paragraph, as compared to a six page statement. . ." (emphasis added).[18] TR, pages 228 and 229. Mr. Mendenhall's testimonial acknowledgment that the dispatch refusal was "the straw" for his termination decision clearly establishes that Mr. Mendenhall reacted to Mr. Bryant's refusal to take the Georgia trip by terminating their contract the next day.

Summary

Both Bearden Trucking and Mr. Bryant were subject to the provisions of the STAA. On November 26, 2002, Mr. Bryant engaged in a protected activity by telling Mr. Mendenhall he refused to take the Georgia dispatch early the next morning due to a DOT hours of service limitation. In response to Mr. Bryant dispatch refusal, on November 27, 2002, Mr. Mendenhall took the adverse action of terminating Bearden Trucking's driving services contract with Mr. Bryant. Specifically, I find Mr. Bryant's protected activity on November 26, 2002 caused Mr. Mendenhall to take the adverse action against Mr. Bryant of terminating his contract on November 27, 2002. Consequently, by the preponderance of the probative evidence, Mr. Bryant has established that Bearden Trucking engaged in unlawful discrimination under the STAA on November 27, 2002.

<u>Affirmative Defense</u>

Although Mr. Bryant has proven unlawful discrimination, Bearden Trucking presents an affirmative defense by asserting legitimate business reasons, rather than Mr. Bryant's protected activity, led to the contract termination. According to Mr. Mendenhall, he terminated Mr. Bryant's contract because he had become less productive than the other owner-operators. When he returned in August 2002, Mr. Bryant performed well for a couple of months. However, by the end of October and in the month of November, Mr. Bryant was driving less miles than was necessary for a driver working full time for Bearden Trucking. This drop off in productivity occurred during a busy season. Part of the productivity problem was Mr. Bryant's refusal to work weekends, even though Bearden

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[18]The remaining portion of his answer stressed the reasons for the termination presented earlier in the written statement.

Trucking was a seven day a week trucking operation. Eventually, Mr. Mendenhall concluded he could not depend on Mr. Bryant to drive enough miles to remain an owner-operator with Bearden Trucking. As a result, on November 27, 2002, Mr. Mendenhall terminated Bearden Trucking's contract with Mr. Bryant.

In assessing the probative value of his stated reasons, I believe Mr. Mendenhall's productivity concern is somewhat undermined by his emphasis on Mr. Bryant's refusal to drive weekends. As he well knows, at the start of their contractual relationship, Mr. Mendenhall verbally agreed with Mr. Bryant that he would not have to drive Sunday mornings, which effectively precluded him from being available for weekend trips. After acknowledging their agreement, Mr. Mendenhall indicated that the situation had changed since their August 2002 verbal agreement and he had come to see Mr. Bryant's insistence on being home on Sunday mornings as a productivity problem. However, Mr. Mendenhall also acknowledged he never approached Mr. Bryant to change their verbal agreement. Consequently, Mr. Mendenhall's own conduct in agreeing to, <u>and not changing</u>, the Sunday morning driving restriction undermines his stated productivity concern about this aspect of their business arrangement.

The other basis for Mr. Mendenhall's productivity/dependability concern has more substantive weight. The owner-operator comparison (RX 1) and driving hours summary (RX 6) do highlight a productivity issue. Although Mr. Bryant was competitive with the other drivers in September and the first three weeks of October, after the third week in October, his relative productivity fell off remarkably. In fact, from November 1 through November 26, 2002, a total of 26 days, Mr. Bryant did not drive 12 days. During that time, Mr. Bryant was understandably unavailable due to family and personal emergencies. At the same time, Mr. Bryant had a contract with Bearden Trucking to provide driving services as an owner-operator during that period. Had Mr. Bryant been an employee of Bearden Trucking, he might have had sufficient fringe benefits in terms of sick, or vacation, leave to cover his emergencies. However, under his contract, as an independent contractor, Mr. Bryant did not have such benefits. Instead, he was an independent contractor who failed to provide the contracted driving services for nearly two weeks. As a result, Mr. Mendenhall's business concerns about Mr. Bryant's dependability as an independent contractor, owner-operator, in the first part of November 2002 were legitimate.

Thus, having found a legitimate business concern, I must determine whether Mr. Mendenhall has met his burden of proving by the preponderance of evidence the affirmative defense that he would have terminated Mr. Bryant's contract, absent his protected activity. Considering that the termination of Mr. Bryant's contract has two components, a) the decision to terminate and b) the timing of the termination, I conclude Mr. Mendenhall can <u>not</u> carry the evidentiary burden for either component.

First, due to Mr. Bryant's unavailability the end of October and first two weeks of November 2002, Mr. Mendenhall had sufficient reasons to be concerned about Mr. Bryant's driving production and to have contemplated termination of their employment relationship. Yet, based on his signed March 26, 2003 written statement, Mr. Mendenhall's resolve to actually terminate the contract, in the absence of Mr. Bryant's dispatch refusal, seems less than certain. According to Mr. Mendenhall, "Had he taken the dispatch, I still probably would have terminated Mr. Bryant's contract, but probably not right then as I did" (emphasis added) (PX 9, page 5). Mr. Mendenhall's use of the word "probably" renders his prediction of an ultimate termination decision speculative. The speculative nature of the termination decision is increased considering that despite his lack of availability during the first part of November 2002, by the time of his trip to Indiana near the end of November 2002, Mr. Bryant had become highly productive. From November 18 through November 26, Mr. Bryant was on-duty working for Bearden Trucking a total of 68.25 hours, just short of the DOT 70 hours on-duty limit (RX 6).

Due to the speculative nature of Mr. Mendenhall's statement about what would have happened absent the protected activity, coupled with Mr. Bryant's exceptional productivity in the later part of November 2002, the preponderance of the evidence falls short of demonstrating Mr. Mendenhall would have actually terminated Mr. Bryant's contract for productivity problems even if Mr. Bryant hadn't refused the dispatch to Georgia.

Second, and profoundly, Mr. Mendenhall has failed to prove that he would have terminated Mr. Bryant's contract on November 27, 2002 due to lack of productivity or dependability issues, absent Mr. Bryant's refusal the night before to take the trip to Georgia. Even if Mr. Mendenhall had made a firm decision to end his business relationship with Mr. Bryant, the preponderance of the more probative evidence establishes that he chose the date of the termination, November 27, 2002, solely due to Mr. Bryant's refusal to accept the Georgia dispatch.

At the hearing, after acknowledging that the dispatch refusal was the "straw" for his decision, Mr. Mendenhall further explained that he decided to act on November 27, 2002 because he "felt it was better not to depend on him and him not be[ing] able to come through" (TR, page 234). Yet, that explanation seems hollow. Setting aside his refusal to accept the Georgia dispatch, what did Mr. Bryant do, or not do, on November 26, 2002 that was so undependable to cause Mr. Mendenhall to terminate the contract the next day? The answer is nothing. In fact, Mr. Mendenhall stated that Mr. Bryant had not done anything wrong on November 26, 2002 during the return trip to South Carolina. Neither the loading problem nor the traffic delay were his fault. He checked in promptly and notified both Mr. Salvo and Mr. Mendenhall about the unexpected problems and delays. Thus, Mr. Bryant committed no productivity, reliability, or dependability errors on November 26, 2002 that would have provided a legitimate basis for changing Mr. Mendenhall's contemplated termination of their contract due to performance/dependability problems into a final decision the next day.

Additionally, if productivity were Mr. Mendenhall's concern, the contract termination on November 27, 2002 seems counter productive. According to Mr. Mendenhall, November was part of his busy season and he needed productive drivers. Thus, while contemplating an end to Mr. Bryant's contract, Mr. Mendenhall faced a dilemma. On the one hand, Mr. Bryant "was holding the steering wheel every now and then. . ." (TR, page 218). At the same time, Mr. Mendenhall needed to find a more productive driver (TR, page 218). So, even though Mr. Bryant had not produced well the first part of November, he was still running some miles for Bearden Trucking. Consequently, having not hired a new driver prior to November 27, 2002, Bearden Trucking's ability to meet production demand was diminished, not enhanced, by Mr. Mendenhall's removal of Mr. Bryant as an owner-operator. Mr. Mendenhall implicitly acknowledged that adverse impact on Bearden Trucking's production by stating that had Mr. Bryant accepted the Georgia dispatch, he " would have tried to have someone in a position to be able to run the miles" that Bearden Trucking needed and Mr. Bryant was unable to accomplish before ending their contract (TR, page 227).

Since no dependability problems concerning Mr. Bryant arose on November 26, 2002, and the contract termination the next day was counter productive for Bearden Trucking, the preponderance of the evidence establishes only one other reason for the timing of Mr. Mendenhall's termination action <u>on November 27, 2002</u> – the night before, on November 26, 2002, Mr. Bryant refused the early morning dispatch to Georgia. Consequently, Mr. Mendenhall is unable to establish that he would have terminated Mr. Bryant's contract <u>on November 27, 2002</u> absent that dispatch refusal.

In summary, Mr. Mendenhall is unable to prove his affirmative defense. After the first two weeks in November, 2002, Mr. Mendenhall had legitimate business reasons to consider terminating Mr. Bryant's contract. However, based on the nature of Mr. Mendenhall's testimony, a determination that he would have nevertheless terminated the contract absent Mr. Bryant's protected activity is speculative. Further, the preponderance of the evidence clearly establishes that had Mr. Bryant not refused the Georgia dispatch, Mr. Mendenhall would <u>not</u> have severed his business relationship with Mr. Bryant <u>on November 27, 2002</u>. Since the preponderance of the evidence in the record fails to establish that absent Mr. Bryant's protected activity Mr. Mendenhall would have a) made a firm decision to terminate Mr. Bryant's contract, and b) acted on that decision on November 27, 2002, his affirmative defense fails.

<u>Conclusion</u>

Through the preponderance of the evidence, Mr. Bryant has proven Bearden Trucking discriminated against him in violation of the STAA on November 27, 2002 by terminating his owner-operator contract in retaliation for his protected activity of refusing to accept a dispatch on November 26, 2002 that would have violated the DOT hours of service regulations. Mr. Mendenhall has failed to carry the burden of proof associated with his asserted affirmative defense that legitimate business concerns would have led to the contract termination on November 27, 2002 in the absence of the discrimination.

Damages

Having established that Bearden Trucking illegally discriminated against him under the Act, Mr. Bryant is entitled to reinstatement with the same pay and terms and conditions of employment, 49 U.S.C. 31105 (b) (3) (A) (ii), and compensatory damages, including back pay, and an adjustment for interest, 49 U.S.C. 31105 (b) (3) (A) (ii) and *Ass't Sec'y & Kerrick v. JLC Industries, Inc.*, 1994 STA 33 (Sec'y Jan. 24, 1995). In the post-hearing brief, Mr. Bryant requested the following damages: $14,533.24 consisting of back pay and differential pay, plus interest; and front pay of $226.54 a week, continuing for a reasonable period of time.

The determination of the appropriate back and front pay is problematic in part because Mr. Bryant's means to produce an income has varied over the relevant period of time. At the time of his contract termination, Mr. Bryant earned his living as an owner-operator driving for Bearden Trucking. Following the contract termination, Mr. Bryant first continued to work as an owner-operator for Thomas Enterprises. However, after he returned his truck, Mr. Bryant found re-employment as an employee driver of Hardaway Concrete and continues to work as a company driver.

As discussed in detail below, when Mr. Bryant drove as an owner-operator, he was an independent contractor and effectively self-employed. On the other hand, as a company driver for Hardaway Concrete, Mr. Bryant was an employee. Thus, comparing Mr. Bryant's gross receipts as an owner-operator with his net income as a company driver presents an apples and oranges problem. In order to best determine Mr. Bryant's economic loss due to the contract termination, I will utilize estimates of his average weekly disposable income that remained after all reasonable expenses and required deductions have been applied to both his owner-operator gross receipts and company driver gross income.[19]

Back Pay

To make a person "whole for injuries suffered for past discrimination," the Act mandates an award of back pay as compensatory damages to run from the date of discrimination until either the complainant receives a bona fide offer of reinstatement, is reinstated or obtains comparable employment. *Nelson v. Walker Freight Lines, Inc.* 1987 STA 24 (Sec'y Jan. 15, 1988), slip op. at 5, *Polwesky v. B & L Lines, Inc.*, 1990 STA 21 (Sec'y May 29, 1991), *Moravec v. HC & M Transportation, Inc.,* 1990 STA 44 (Sec'y Jan. 6, 1992), *and Polgar v. Florida Stage Lines,* 1994 STA 46 (ARB Mar. 31, 1996). Although the calculation of back pay must be reasonable and based on the evidence, the determination of back wages does not require "unrealistic exactitude." *Cook v. Guardian Lubricants, Inc.*, 1995 STA 43 (ARB May 30, 1997), slip op. at 11-12, n.12. Any uncertainty concerning the amount of back pay is resolved against the discriminating party. *Clay v. Castle Coal & Oil Co.*, Inc., 1990 STA 37 (Sec'y June 3, 1994) and *Kovas v. Morin Transport, Inc.*, 1992 STA 41 (Sec'y Oct. 1, 1993). At the same time, the lost wages claimed as back pay must have been caused by the employer's misconduct. *Hampton v. Sharp Air Freight Service, Inc.*, 1991 STA 49 (Sec'y July 24, 1992). Compensatory damages may also include losses incurred by a complainant due to the forced sale of an owner-operator's truck, provided a credible basis exists for estimating the value of the actual loss. *Ass't Sec'y & Lansdale v. Intermodal Cartage Co., Ltd.,* 1994 STA 22 (Sec'y July 26, 1995). Finally, prejudgment interest is calculated in accordance with 26 U.S.C. § 6621 (1988), which specifies the rate for use in computing interest charged on the underpayment of

[19]This comparison still has a deficiency because the record does not contain evidence of the value of Mr. Bryant's fringe benefits as a company driver, such as sick and vacation leave. The practical value of these benefits is demonstrated by Mr. Bryant's experience in November 2002. As an independent driver, Mr. Bryant did not have any paid leave benefits. As a result, when he took time off in November 2002 and didn't drive, Mr. Bryant received nothing.

federal taxes. *Gagnier v. Steinmann Transportation, Inc.* 1991 STA 46 (Sec'y July 29, 1992).

The employer, and not the complainant, bears the burden of proving a deduction from back pay on account of interim earnings. *Hadley v. Southeast Corp. Serv. Co.*,, 1986 STA 24 (Sec'y June 28, 1991) and *Nolan v. AC Express*, 1992 STA 37 (Sec'y Jan. 17. 1995). Thus, the burden of showing that a complainant failed to make reasonable efforts to mitigate his damages is on the employer. *Polwesky*, 1990 STA 21, *citing Carrero v. N.Y. Hous. Auth.*, 890 F.2d 569 (2d Cir. 1989) and *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614 (6th Cir. 1983). While the complainant need only make reasonable efforts to mitigate his damages and is not held to the highest standards of diligence, and doubt is resolved in the complainant's favor, *Moyer v. Yellow Freight System*, Inc. 1989 STA 7 (Sec'y Aug. 21, 1995), the employer may carry the evidentiary burden by showing that jobs for the complainant were available during the back pay period. *Polwesky*, 1990 STA 21. The reasonableness of the effort to find substantially equivalent employment should be evaluated in terms of the complainant's background and experience in relation to the relevant job market. *Intermodal Cartage Co., Ltd. v. Reich*, No. 96-3131 (6th Cir. Apr. 24, 1997)(unpublished decision available at 1997 U.S. App. LEXIS 9044)(case below 1994 STA 22).

Pre-discrimination Average Weekly Disposable Income

With these principles in mind, I turn to the determination of Mr Bryant's back pay. The first step in the process requires defining Mr. Bryant's average weekly disposable income as an owner-operator for Bearden Trucking prior to the November 27, 2002 contract termination.

In his business relationship with Bearden Trucking, Mr. Bryant was paid 82 cents per mile, plus fees for additional stops and detention. From his gross receipts, Bearden Trucking deducted charged fuel, repair advances and handling fees. As an owner-operator, Mr. Bryant was then responsible for all other associated trucking expenses, plus additional taxes related to his self-employment status. The parties dispute what expenses and taxes are appropriate deductions from Mr. Bryant's gross receipts.

To establish his Bearden Trucking income, Mr. Bryant relies on the weekly settlement statements from August 4, 2002 to December 1, 2002, except for the week ending September 1, 2002, which is missing (PX 7 and PX 8). Dividing actual disbursements which represent the mileage and trip payments reduced by fuel, advances, and handling charges, by fifteen weeks, Mr. Bryant asserts his average weekly net receipt from Bearden Trucking was $1,130. Since his monthly truck payment was approximately $1,800, Mr. Bryant also subtracts a weekly truck payment of $415[20] to obtain an average weekly income of $715.

Bearden Trucking asserts the above calculations overstate Mr. Bryant's actual weekly income because he did not include other expenses associated with running a commercial tractor truck. According to Bearden Trucking, additional expenses established by the trucking industry should also

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[20](1,800 x 12)/52.

be deducted (RX 4). These deductions include insurance, license fees, depreciation, maintenance and repair, and taxes associated with self-employment. Bearden Trucking shows Mr. Bryant drove a total of 28,772 miles between August 5, 2002 and November 27, 2002. Based on that mileage, these multiple additional deductions for other operating expenses total $330. Using Mr. Bryant's numbers for net receipt and his weekly truck payment, these additional operating expenses would reduce his average weekly income from $715 to $385.

Initially, in sorting out these two positions, as set out in the table below, I find that between August 5 and November 27, 2002, Mr. Bryant drove 28,772 miles[21] generating $25,285 in gross revenue that led to an actual disbursement to him of $17,877. Though the duration of his contract covered 16.5 weeks in calendar days, Mr. Bryant was off an entire week at the end of October and beginning of November. As a result, to find his average weekly total receipt for his driving efforts, I divide the total disbursement of $17,877 by 15.5 weeks. That computation establishes that Mr. Bryant's average weekly receipt from Bearden Trucking was $1,153.

	Week Ending	Mileage	Total Revenue[22]	Fuel Deduction	Repair Advances/ Expenses	Handling Fees	Amount to Mr. Bryant
1	8/11/02	1,007.6	926.23	284.33	0	10.00	631.90
2	8/18/02	1,925.6	1,853.99	670.86	12.90	20.00	1,150.23
3	8/25/02	2,760	2,413.20	531.09	0	15.00	1,867.11
4	9/01/02	1,575[23]	1,291.50[24]	351.00[25]	0	10.00[26]	930.50
5	9/08/02	1,657.5	1,517.13	523.56	0	15.00	978.57
6	9/15/02	2,941.2	2,452.28	487.41	0	15.00	1,949.87

[21]Mr. Bryant's collection of fifteen settlement statements (PX 6) which shows a total mileage of 27,197, does not include the summary for the week ending September 1, 2002. Consequently, I rely on the employer's mileage of 28,772 set out in RX 4.

[22]Miles x 82 cents + additional stops + detention + misc. reimbursement.

[23]28,772 - 27,197 = 1,575.

[24]1,575 x .82.

[25]The total mileage in the fifteen weekly summaries submitted by Mr. Bryant is 27,197. The total associated fuel charges for that mileage was $6,063. As a result, Mr. Bryant's fuel costs were about $0.223 a mile ($6,063/27,197) and his fuel cost for the mileage run this week was about $351(1,575 x 0.223).

[26]Bearden Trucking applied a $5 handling charge for each fuel stop. On average, $150 in fuel charges represented one fuel charge. *See* charged handling fee for weeks ending 8/18/02 and 9/15/02.

7	9/22/02	2,178.5	1,786.37	538.08	77.88	15.00	1,155.41
8	9/29/02	1,551.7	1,451.14	504.56	0	15.00	931.58
9	10/06/02	2,178.3	1,911.21	362.76	660.07	15.00	873.38
10	10/13/02	2,021.6	1,707.71	603.27	3.25	20.00	1,081.19
11	10/20/02	2,632.9	2,313.98	420.95	0	15.00	1,878.03
12	10/27/02	1,601.9	1,313.56	158.87	0	5.00	1,149.69
13	11/03/02[27]	0	0	0	0	0	0
14	11/10/02	1,380.9	1,260.84	450.86	0	15.00	794.98
15	11/17/02	527.4	432.47	163.10	20.00	5.00	244.37
16	11/24/02	1,642	1,602.94	364.21	20.00	10.00	1,208.73
17	12/01/02[28]	1,190.5	1,051.21	0	0	0	1,051.21
Totals		28,772.6	25,285.76	6,414.91	794.10	200	17876.75

Next, both parties agree that the weekly portion of Mr. Bryant's monthly $1,800 truck payment should then be deducted from his average weekly receipts. This computation produces a weekly income figure of $738 ($1,153 - 415), which Mr. Bryant maintains represents his average weekly income. However, while some of its suggested additional expenses are speculative, I do agree with Bearden Trucking that Mr. Bryant's proposed weekly figure does not accurately reflect his total expenses as an owner-operator. Notably, Mr. Bryant has not included deductions for expendable items, such as tires and his annual licensing fees. Additionally, Mr. Bryant has not factored in other expenses, related to taxes, associated with his unique self-employment status that further reduce his owner-operator weekly income. As specifically mentioned in his contract with Bearden Trucking (PX 3), as an independent contractor, Mr. Bryant was liable for self-employment taxes which include a) medicare, social security, state, and federal taxes that would have been otherwise withheld from his paycheck as an employee, and, b) the employer's share of social security and medicare taxes.[29]

So, as a third step, I turn to calculating these additional expenses and self-employment taxes. Bearden Trucking presented typical costs associated with operation of a commercial truck in the

[27]Between October 27, 2002 and November 3, 2002, Mr. Bryant was not on-duty any day (RX 6).

[28]This last week only represents half a week of employment since Mr. Bryant's contract was terminated effective November 27, 2002.

[29]Neither Mr. Bryant nor Bearden Trucking submitted a copy of Mr. Bryant's 2002 federal tax return. In declaring his income as an independent contractor in 2002, Mr. Bryant would have attached to his federal tax return Schedule C, Profit and Loss, Business, and Schedule SE, Self-Employment Tax. At this time, I take judicial notice under Schedule SE, the self-employment tax is 15.3% of net income.

southeastern region. Although Mr. Bryant challenged the assumptions associated with some of the charges, such as repairs, he did not specifically challenge the use of $0.022/mile for expendable items, including tires and tubes (RX 4). Applying that rate against Mr. Bryant's total mileage and then dividing that figure by 15.5 weeks, yields a weekly expense of about $41.[30] Then, based on Mr. Bryant's testimony that his annual truck license renewal fees in February 2003 was $1,000, I conclude a weekly deduction of $19 for licensing was warranted.[31]

Turning to taxes, being self-employed as an owner-operator, Mr. Bryant was exposed to a unique set of taxes. When Mr. Bryant worked as a company driver, his company paid half of his medicare and social security payments. However, as an owner-operator, in addition to his individual share of those two taxes, Mr. Bryant was also responsible for the employer's share. Thus, half of Mr. Bryant's 15.3% self-employment tax[32] represents his share of social security and medicare as an employer. So, because he operated as an owner-operator, another 7.65% needs to be deducted based on his weekly taxable income (gross receipts from Bearden Trucking minus the deductions for truck payment, expendable items, and licensing fee), which equals $678.[33] That deduction equals about $52.[34]

Finally, since my evaluation of economic loss will be based Mr. Bryant's average weekly disposable income, his weekly receipts as an owner-operator need to be further reduced by the percentage of the taxes would have been withheld from his earnings if he had been an employee. Again, I make this last deduction to find an average weekly income that can be used for comparison with Mr. Bryant's other income as an owner operator with Thomas Enterprises and a company driver with Hardaway Concrete.

To determine the actual amount of this final tax percentage, I turn to Mr. Bryant's weekly income statements from Hardaway Concrete (PX 4 and PX 5). A review of those statement establishes that Mr. Bryant's total income for fourteen weeks of $9,063.72 was reduced by $1,643.27 in taxes (social security, medicare, federal, and state) for a tax rate of 18.13%.[35] Applying that percentage to Mr. Bryant's taxable income of $678 yields an additional tax deduction of about $123.[36]

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[30](28,772 x 0.022)/15.5

[31]1,000/52

[32]*See* footnote 29.

[33]$1,153 - $415 - $41 - $19.

[34]678 x 0.0765.

[35]*See* table on pages 47 and 48. $1,643.27/9,063.72.

[36]678 x 0.1813.

In summary, as set out below, I find Mr. Bryant's average weekly disposable income as an owner-operator with Bearden Trucking prior to the contract termination on March 26, 2003 was $503.

$1,153	(average weekly receipts)
- 415	(truck payment)
- 41	(expendable expenses)
- 19	(licensing)
- 52	(self-employment tax - employer)
- 123	(taxes otherwise withheld)
$ 503	

Although as an owner-operator with Bearden Trucking, Mr. Bryant assumed both the risk and profit of a truck owner-operator, a comparison with the industry rate for a company truck driver provides a benchmark for his estimated average weekly disposable income. As presented by Bearden Trucking, the industry standard mileage rate for a truck driver in the southeastern region was $0.32 a mile. That rate times Mr. Bryant's mileage of 28,772 divided by 15.5 weeks equals an average weekly receipt of $594. If that figure is then further reduced by 18.13% for employee taxes, an industry driver running the same number of miles as Mr. Bryant, during the same period of time, would have had a disposable income of about $486 a week. This benchmark comparison shows Mr. Bryant, working as an owner-operator for Bearden Trucking, was doing slightly better than an industry company driver.

First Period of Unemployment

From November 27, 2002, the effective date of the contract termination, Mr. Bryant was unemployed and looking for work. He promptly found re-employment with Thomas Enterprises as an owner-operator effective December 16, 2002 (PX 6). Having caused Mr. Bryant's unemployment through discrimination, Bearden Trucking is liable for the two and a half weeks of the economic loss Mr. Bryant suffered due to the loss of his average weekly disposable income of $503. The compensatory damages equal $1,257.5 ($503 X 2.5), plus interest calculated pursuant to 26 U.S.C. § 6621.

Thomas Enterprises

Between December 16, 2002 and February 21, 2003, Mr. Bryant drove for Thomas Enterprises as an owner-operator with the following gross income and expenses (PX 6).

	Week Ending	Gross Income	Fuel Deduction	Road Expenses	Truck Expenses	Net
1	12/20/02	1,500	341.05	15.00	60.00	1,083.95
2	12/27/02	250	0	0	0	250.00
3	1/3/03	850	347.22[37]	0	0	502.78
4	1/10/03	0	0	0	0	0
5	1/17/03	600	278.77	15.00	37.99[38]	268.24
6	1/24/03	1,100	486.53	40.00	6.39	567.08
7	1/31/03	1,130	390.32	60.00	7.30	672.38
8	2/7/03	1,460	611.21[39]	25	3.55	820.25
9	2/14/03	0	0	0	0	0
10	2/21/03	1,125	552.17	74.50	30.00	468.33
Totals		8,015	3,007.27	229.5	145.23	4,633.01

Since Mr. Bryant did not generate any income two of the ten weeks that he drove for Thomas Enterprises, his average weekly net receipt from Thomas Enterprises for the eight weeks he drove was $579.[40] After the figure is reduced by his weekly trucking expenses of the truck payment and licensing fee,[41] his weekly taxable income was $145.[42] Finally, when that taxable amount is further reduced for self-employment tax, and withholding taxes, a total of $41,[43] Mr. Bryant's average weekly disposable income was $104.

Prior to determining whether Bearden Trucking must pay the difference between Mr. Bryant's average weekly disposable income with Bearden Trucking ($503) and his average weekly disposable income with Thomas Enterprises ($104) for the entire ten week period of his employment, I must

[37]$145.71 + 201.51.

[38]$3.99 + 34.00.

[39]$532.66 + 78.55. Since Mr. Bryant did not produce any income for the week ending 2/14/03, I have added the $78.55 fuel charge for that week with the fuel charge for 2/7/03.

[40]$4,633/8.

[41]Because Mr. Bryant did not provide the number of miles that he drove, I am unable to further reduce the net receipt figure for the business expense associated with expendable items.

[42]$579 - 415 -19.

[43]($145 x 20.65%) + ($145 x 7.65%).

address two other considerations.

First, Bearden Trucking asserts Mr. Bryant failed to mitigate his damages in many ways. As an experienced truck driver and owner-operator, and in light of the multiple job openings sent out in the Sunday classified ads (RX 2), Mr. Bryant was readily employable in the Greenville, South Carolina area. However, he chose to limit his job opportunities by imposing personal work limitations. Notably, his insistence not to work on Sunday mornings artificially limited his ability to be a productive driver by effectively precluding his ability to drive on weekends. Further, when his income at Thomas Enterprise proved to be insufficient, Mr. Bryant should have moved on and obtained a better paying owner-operator job.

In considering Bearden Trucking's mitigation arguments, I believe a portion clearly fails because when Mr. Bryant took a contract with Thomas Enterprises he merely duplicated the personal driving limitations that he had during his contract with Bearden Trucking. In other words, Bearden Trucking is not in a position to complain about Mr. Bryant's failure to drive on weekends with Thomas Enterprises when Mr. Mendenhall agreed to the same limitation and never changed it.

The other aspect of the mitigation argument - Mr. Bryant's delay in leaving Thomas Enterprises - does seem more viable. However, Mr. Bryant credibly testified about a month and a half into his contract with Thomas Enterprises, his economic distress associated with insufficient loads became apparent. At that time, the end of January 2003, he started looking for another job opportunity. During the following three weeks, he was unsuccessful and finally stopped driving for Thomas Enterprises when his truck license expired. Under these circumstances, and considering the short time spans, I do not consider Mr. Bryant's action so unreasonable to support a finding that he failed to mitigate his damages at Thomas Enterprises.

The second consideration involving Bearden Trucking's liability for the pay differential during Mr. Bryant's contract with Thomas Enterprises relates to the two weeks, ending 1/10/03 and 2/14/03, when he didn't drive. During those two weeks, Mr. Bryant did not produce any income. As one possible explanation for this two weeks of inactivity, Mr. Bryant testified that his ability to produce income with Thomas Enterprises was hindered by the lack of sufficient loads. In that case, Bearden Trucking, absent any other consideration, would be liable for the pay differential for the entire ten week period of employment.

On the other hand, as Mr. Bryant's work history with Bearden Trucking demonstrates, even when loads were readily available, Mr. Bryant didn't drive at least one whole week during his 17 weeks with Bearden Trucking. As I mentioned before, regardless of the reason for Mr. Bryant's decision not to drive that week, as an independent contractor, he bore the adverse financial impact of his voluntary inactivity.

In light of these two probable explanations, and based on his work history with Bearden Trucking, I conclude Mr. Bearden should bear the economic loss associated with one of his two weeks of inactivity with Thomas Enterprises. As a result, I find Bearden Trucking is liable for the difference in pay of $399 ($503 - 104) for <u>nine</u> weeks which equals compensatory damages of

$3,591[44] for this period of time, plus interest calculated pursuant to 26 U.S.C. § 6621.

Second Period of Unemployment

From February 22, 2003 (PX 6) to March 30, 2003 (PX 4 and PX 5), Mr. Bryant was unemployed. Determining Mr. Bryant's damages for this five week period raises two issues related to loss of the truck and back pay.

Loss of the Truck

As of February 28, 2003, due to his lack of renewal funds, Mr. Bryant's license to operate his truck expired and he lost his ability to continue operating as an owner-operator. Then, on March 27, 2003, Mr. Bryant lost the truck itself. Mr. Bryant claims Bearden Trucking's discrimination was the cause of these two losses. Implicit in Bearden Trucking's defense is that Mr. Bryant is responsible for the loss of his truck because he chose not to drive enough miles while working for Bearden Trucking and stayed too long at Thomas Enterprises.

Upon consideration of their respective positions and review of the evidence, I conclude Bearden Trucking's discriminatory contract termination, rather than Mr. Bryant's choices, was the principle cause for Mr. Bryant's loss. Although not as productive as other drivers at Bearden Trucking, Mr. Bryant was nevertheless able to clear $503 each week after all reasonable expenses associated with the operation of his truck were deducted. After Bearden Trucking terminated his contract, he spent two and a half weeks unable to drive his truck for income. Eventually, Mr. Bryant found similar work conditions, in terms of no Sunday driving and local trips, at Thomas Enterprises.

Unfortunately, as Mr. Bryant credibly testified, the owner of Thomas Enterprises was not able to generate the same amount of business that had been available at Bearden Trucking. Unlike his situation with Bearden Trucking, Mr. Bryant had to make numerous return trips without cargo while driving for Thomas Enterprises. Consequently, after being unemployed for two and a half weeks, he then barely generated $104 in weekly income after expenses. Such a low weekly income could hardly sustain Mr. Bryant. Under these circumstances, in which he experienced a weekly income drop from $503 to $104, Mr. Bryant's inability to continue to meet the financial demands of owing and operating a commercial truck is not surprising. Since Mr. Mendenhall terminated the contract and the loss of the contract led Mr. Bryant to Thomas Enterprises with its reduced income opportunity, I find the retaliatory discrimination by Bearden Trucking was a critical factor in Mr. Bryant being unable to renew his truck's license and losing the truck.

Having determined that Bearden Trucking's discrimination played a key role in the loss of Mr. Bryant's truck, I next have to determine whether he may recover any damages for that loss. According to Mr. Bryant, since the dealer had to repossess his truck, his credit has been adversely

[44] $399 x 9.

affected, which may cause him to pay higher interest rates if he buys another truck. He also lost the economic advantage associated with a program for first-time truck purchasers.

In deciding whether an award of compensatory damages is warranted for these stated adverse repercussions, I am unable to clear a significant hurdle. While judicial authority exists for compensating an owner-operator for loss of his truck due to retaliatory discrimination, Mr. Bryant has failed to specify the amount of his actual damages. Significantly, Mr. Bryant did not present any evidence on the amount of equity he may have lost due to the repossession of his truck. His concerns about the future adverse financial impact associated with the loss of his first truck are certainly reasonable. However, the actual amount of associated damages, if any, is both anticipatory and too speculative to assess damages against Bearden Trucking, even considering that doubts are to be resolved against the company.

Back Pay

Based on his credible testimony, I find Mr. Bryant made several contacts a week to find employment that satisfied his singular driving limitations. Even though the Sunday classified ads show many truck driving opportunities for both owner-operators and company drivers, that information lacks sufficient detail to determine whether multiple job opportunities suitable to Mr. Bryant's circumstances were readily available. Again, I note that the limitations Mr. Bryant imposed on his job search, and the conditions he eventually found at Hardaway Concrete, principally no Sunday driving and no trip requiring long periods away from home, are the same employment conditions he had at Bearden Trucking both as a company driver and owner-operator. Consequently, I find Mr. Bryant made a reasonable effort during this time period to seek re-employment. As a result, Bearden Trucking is liable for Mr. Bryant's loss of weekly income of $503 during the five week period of unemployment for a total of $2,515,[45] plus interest calculated pursuant to 26 U.S.C. § 6621.

Front Pay

Mr. Bryant has presented a claim for front pay of $236 a week, and continuing for a reasonable period of time.

Re-establishment of the employment relationship is a usual component of the remedy in a discrimination case, *Nolan v. AC Express*, 1992 STA 37 (Sec'y Jan. 17, 1995), and an unconditional offer of reinstatement will toll an employer's back pay liability. *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1983). However, if reinstatement is not feasible, then the judicially established principle of front pay may be applied in an attempt to make the complainant whole. *Nolan*, 1992 STA 37. If the complainant is no longer qualified for his pre-discrimination employment, then he is not entitled to reinstatement, and back pay will terminate at the time of the disqualification. *Pope v. Transportation Services, Inc.* 1988 STA 8 (ALJ May 1988, adopted by Sec'y Sept. 13, 1988).

[45]$503 x 5.

In light of the principles noted above, an argument may be made that Mr. Bryant is not entitled to reinstatement since he is no longer qualified to work as an owner-operator. On the other hand, since I have determined Bearden Trucking's discrimination played a major role in Mr. Bryant's inability to function as an owner-operator, the damages may be analyzed based on front pay because reinstatement is not feasible.

I do not have to really resolve this issue because, as set out below, since he started working for Hardaway Concrete, Mr. Bryant's average weekly disposable income has been $530 (PX 4 and PX 5) which exceeds his average weekly disposable income of $503 from Bearden Trucking.

	Week Ending	Gross Pay	Tax Deductions[46]	Net Income
1	4/05/03	412.08	53.64	358.44
2	4/12/03	384.00[47]	46.90	337.10
3	4/19/03	775.02	154.69	620.33
4	4/26/03	806.88	164.13	642.75[48]
5	5/03/03	959.16	209.30	749.86
6	5/10/03	421.80	55.96	365.84
7	5/17/03	780.78	156.42	624.36
8	5/24/03	384.00	46.90	337.10
9	5/31/03	830.64	164.08	666.56
10	6/07/03	431.88	55.11	376.77
11	6/14/03	833.70	164.98	668.72
12	6/21/03	777.00	148.17	628.83
13	6/28/03	879.78	178.64	701.14
14	7/05/03	387	44.35	342.65
Totals		$9,063.72	$1,643.27	$7,420.45

When he drove for Bearden Trucking, Mr. Bryant's average weekly disposable income was

[46]Social Security, medicare, federal, and state.

[47]Mr. Bryant had a guaranteed gross income of $384 based on 32 hours of duty.

[48]Starting this week, an additional $82.63 was deducted from Mr. Bryant's paycheck for "CS." Since "CS" is not identified, I have not included that deduction. As a result, from this week on, this net income figure is greater than Mr. Bryant's actual paycheck by $82.63.

$503.
In contrast, at Hardaway Concrete, Mr. Bryant has been able to generate $530[49] in average weekly disposable income. Thus, Mr. Bryant is unable to establish damages in the form of economic loss after he started his employment with Hardaway Concrete. Since he is economically better off in terms of average weekly disposable income at Hardaway Concrete as a company driver than when he worked for Bearden Trucking as an owner-operator, Mr. Bryant is <u>not</u> entitled to front pay as of April 1, 2003.[50] Accordingly, his claim for front pay must be denied.

CONCLUSIONS

On November 27, 2003, in response to Mr. Bryant's protected activity of refusing a dispatch due to DOT hours of service limitations, Bearden Trucking terminated his driving services contract thereby committing an unlawful act of discrimination under the STAA. Despite legitimate business concerns about Mr. Bryant's productivity, Bearden Trucking has failed to prove Mr. Bryant's contract would have been terminated on November 27, 2002 in the absence of this discrimination.

Having committed retaliatory discrimination under the Act, Bearden Trucking is liable for back pay, and compensatory damages, for three periods of time based onMr. Bryant's average weekly disposable income of $503 while under contract with Bearden Trucking. For the first period of his unemployment from November 27, 2002 through December 15, 2002, Bearden Trucking must pay back pay in the amount of $1,257.50. Next, since Mr. Bryant's average weekly disposable income while driving as an owner-operator for Thomas Enterprises was $104, Bearden Trucking must pay compensatory damages for his loss of income totaling $3,591.00. Finally, Bearden Trucking is liable for back pay totaling $2,515.00 for the five weeks of employment between February 21, 2003 and March 30, 2003. In total, Bearden Trucking must pay Mr. Bryant $7,363.50 in back pay and compensatory damages, plus interest calculated pursuant to 26 U.S.C. § 6621.

Although Bearden Trucking's contract termination played a major part in the eventual loss of his tractor truck, Mr. Bryant has failed to establish a definable amount of damages associated with that loss.

Because Mr. Bryant no longer owns a commercial truck, reinstatement is not feasible. At the same time, since Mr. Bryant's average weekly disposable income as a company driver for Hardaway Concrete is higher than the average weekly disposable income he earned with Bearden Trucking as an owner-operator, Mr. Bryant is not entitled to front pay.

ORDER

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[49]$7,420.45/14.

[50]Likewise, since Mr. Bryant has found better employment in terms of weekly disposable income, Bearden Trucking's liability for back pay also ceases as of April 1, 2003.

1. The Respondent, MENDENHALL ACQUISITION CORP., d/b/a BEARDEN TRUCKING, **SHALL PAY** the Complainant, MR. DOMICO ROMERIO BRYANT back pay, and compensatory damages, in the total amount of **$7,363.50**, plus prejudgment interest calculated pursuant to 26 U.S.C. § 6621.

2. The claims by the Complainant, MR. DOMICO ROMERIO BRYANT, for front pay and compensatory damages due to the loss of his truck are **DENIED**.

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: October 31, 2003
Washington, D.C.

NOTICE: This Recommended Decision and Order and the administrative file will be forwarded for review to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., Washington D.C. 20210. See 29 C.F.R. § 1978.109 (a); 61 Fed. Reg. 19978 and 19982 (1996).